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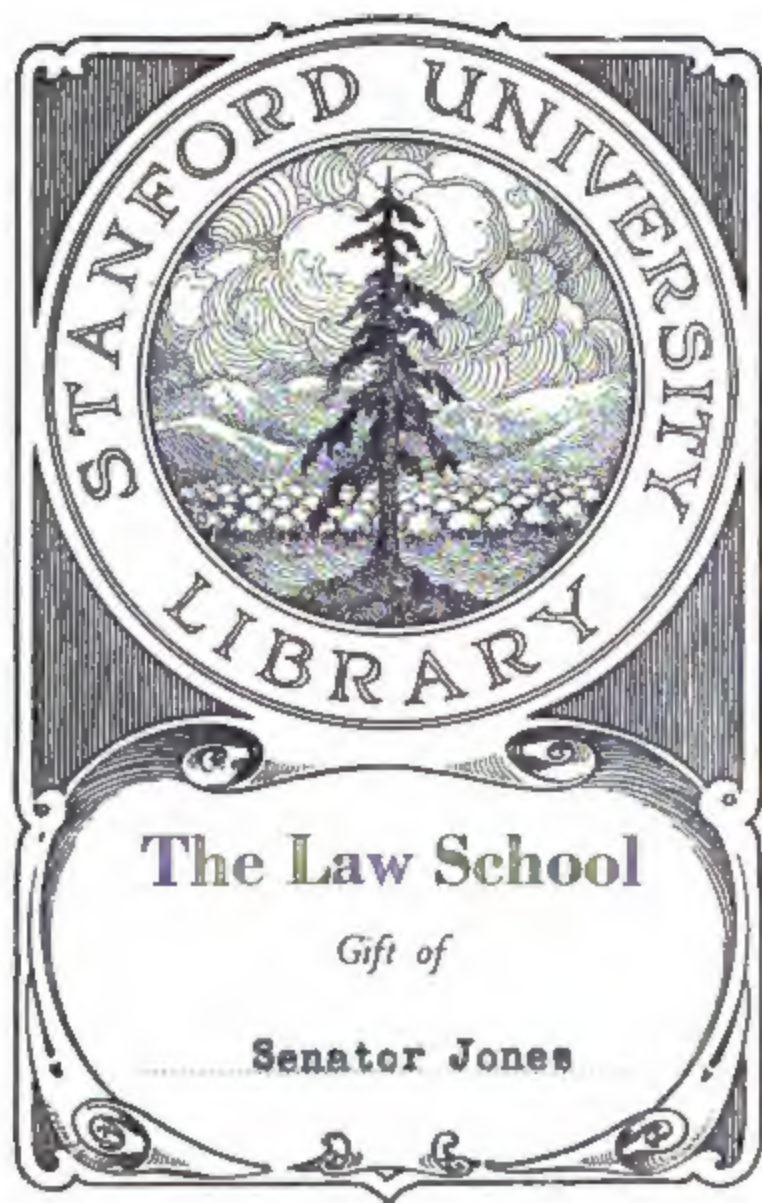
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SELECT CASES
AND OTHER AUTHORITIES ON THE LAW OF
CONVEYANCES
AND RELATED SUBJECTS

BY
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By JOSEPH WARREN

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PREFACE

THIS collection is designed for a course of thirty-two lectures for second-year law students who have already completed Professor Edward H. Warren's Cases on Property or its equivalent. It is not expected that all the material here printed can be covered. A judicious selection must be made.

The generosity of Professor John C. Gray has made available the second, third, and sixth volumes of his case-books on Property; and the editor has made such free use of this material that the majority of cases here appearing have been taken from those collections, and the scheme of the third volume has been followed to a considerable extent. Several of Mr. Gray's longer notes have been reprinted here. The source of such notes is duly indicated. The editor has also had placed at his disposal the MS. notes and abstracts which Mr. Gray carried with him to the class room. It is difficult to estimate, much more to point out, to what extent the editor has been assisted by these memoranda. It has been his attempt to follow Mr. Gray's work whenever possible rather than to try to find another arrangement of equal value. His debt, therefore, is a very large one.

The editor has also had the benefit of the advice of many of the teachers of Property throughout the country, with whom he has corresponded or conversed before collecting the authorities.

JOSEPH WARREN

CAMBRIDGE, February 1, 1922.

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¹ Professor Williston's summary of the statutes of the several states in regard to seals is to be found on page 607.

SELECT CASES

AND OTHER AUTHORITIES ON THE LAW OF

CONVEYANCES

AND RELATED SUBJECTS

CHAPTER I

ACCRETION

GIFFORD v. YARBOROUGH

5 Bing. 165. 1828.

BEST, C. J.¹ My Lords, the questions which your Lordships have proposed for the opinion of the Judges is as follows: "A. is seised in his demesne as of fee of the manor of N., and of the demesne lands thereof, which said demesne lands were formerly bounded on one side by the sea. A certain piece of land, consisting of about 450 acres, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and imperceptibly, and by imperceptible increase in long time cast up, deposited, and settled by and from flux and reflux of the tide, and waves of the sea in, upon, and against the outside and extremity of the said demesne lands hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, grown, and accrued as aforesaid, belong to the Crown or to A., the owner of the said demesne lands? There is no local custom on the subject."

Sea washed matter on land. Does this land belong to A or crown?

Rule { The Judges have desired me to say to your Lordships that land gradually and imperceptibly added to the demesne lands of a manor, as stated in the introduction to your Lordships' question, does not belong to the Crown, but to the owner of the demesne land.

All the writers on the law of England agree in this: that as the king is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

Soil once covered by sea belong to king.

But this right of the sovereign might, in particular places, or, under circumstances, in all places near the sea, be transferred to

¹ In this report in Bingham, only the opinions of the Judges and of the Law Lords are given. *Sub nom. The King v. Yarborough* the case is fully reported in the King's Bench, 3 B. & C. 91; and in the House of Lords, 2 Bligh N. S. 147.

those who claim
based by time
immemorial
by custom
must prove it

certain of his subjects by law. A law giving such rights may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial. Such as claim under the former must plead it and establish their pleas by proof of the existence of such a custom from time immemorial.

General customs were in ancient times stated in the pleadings of those who claimed under them; as the custom of merchants, the customs of the realm with reference to innkeepers and carriers, and others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence; they are considered as adopted into the common law, and as such are recognized by the Judges without any evidence. These are called "customs" because they only apply to particular descriptions of persons, and do not affect all the subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws; as an Act of Parliament applicable to all merchants, or to the whole body of the clergy, is to be regarded by the Judges as a public Act.

custom
pt. to land
by sea
must
be pleaded.

If there is a custom regulating the right of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges as part of the common law. We think there is a custom by which land from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached, although it has been the fundus maris, and as such the property of the king. Such a custom is reasonable as regards the rights of the king, and the subjects claiming under it; beneficial to the public; and its existence is established by satisfactory legal evidence.

diff. between
derelict
alluvion
land.

There is a great difference between land formed by alluvion, and derelict land. Land formed by alluvion must become useful soil by degrees too slow to be perceived: little of what is deposited by one tide will be so permanent as not to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. But the sea frequently retires suddenly, and leaves a large space of land uncovered.

alluvion

When the authorities relative to these subjects are considered, this difference will be found to make a material distinction in the law that applies to derelict lands, and to such as are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion would be hard enough or sufficiently wide to be used beneficially by any one but the owner of the lands adjoining. As soon as alluvion lands rise above the water, the cattle from the adjoining lands will give them consistency by treading on them; and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide the owner of the adjoining lands may render them productive. Thus

lands which are of no use to the king will be useful to the owner of the adjoining lands, and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz. by occupation and improvement.

*title by
occupation
& improvement*

Locke in a passage in his Treatise on Government, in which he describes the grounds of the exclusive right of property, says: "God and man's reason commanded him to subdue the earth; that is, improve it for the benefit of life, and therein lay out something upon it that was his own, his labor. He that in obedience to that command subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property which another had no title to, nor could without injury take from him."

*Custom
gives
lands
gained
by
alluvion
to owner
adj. lands.*

This passage proves the reasonableness of the custom that assigns lands gained by alluvion to the owner of the lands adjoining.

The reasonableness is further proved by this, that the land so gained is a compensation for the expense of embankment, and for losses which frequently happen from inundation to the owners of lands near the sea.

This custom is beneficial to the public. Much land which would remain for years, perhaps forever, barren, is in consequence of this custom rendered productive as soon as it is formed. Although the sea is gradually and imperceptibly forced back, the land formed by alluvion will become of a size proper for cultivation and use; but in the mean time the owner of the adjoining lands will have acquired a title to it by improving it.

*Value of
customs.*

The original deposit constitutes not a tenth part of its value; the other nine tenths are created by the labor of the person who has occupied it; and, in the words of Locke, the fruits of his labor cannot, without injury, be taken from him.

*Value of
alluvion
lands
comes
largely from
acts of owner.*

The existence of this custom is established by legal evidence. In Bracton, book 2, cap. 2, there is this passage: "Item, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum; et per alluvionem adjeci dicitur quod ita paulatim adjecitur quod intelligere non possis quo momento temporis adjiciatur. Si autem non sit latens incrementum, contrarium erit."

In a treatise which is published as the work of Lord Hale, treating of this passage, it is said: "that Bracton follows in this the civil law writers; and yet even according to this the common law doth regularly hold between parties. But it is doubtful in case of an arm of the sea." Hale de Jure Maris, p. 28. It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institute, lib. 2, tit. 1, § 20. But Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs. Lord Hale admits that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why the same

question between the Crown and a subject should not be decided by the same rule. Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry the Third, gives great authority to his writings. Lord Hale, in his History of the Common law (cap. 7), says, that it was much improved in the time of Bracton. This improvement was made by incorporating much of the civil law with the common law.

We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamor raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these and all the Norman customs which followed would not have been sufficient to form a system of law sufficient for the state of society in the times of Henry the Third. Both courts of justice and law writers were obliged to adopt such of the rules of the Digest as were not inconsistent with our principles of jurisprudence. Wherever Bracton got his law from, Lord Chief Baron Parker, in Fortesque, 408, says, "As to the authority of Bracton, to be sure many things are now altered, but there is no color to say it was not law at that time. There are many things that have never been altered, and are now law." The laws must change with the state of things to which they relate; but, according to Chief Baron Parker, the rules to be found in Bracton are good now in all cases to which those rules are applicable. But the authority of Bracton has been confirmed by modern writers and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down is to be found in 2 Rolle's Abr. 170; in Com. Dig., tit. Prerogative (D. 61); in Callis (Broderip's edition), p. 51; and in 2 Bl. Com. 261.

In the *Case of the Abbot of Peterborough*, Hale de Jure Maris, p. 29, it was holden: "Quod, secundum consuetudinem patriæ, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costeræ maris adjacentes projecta." In the treatise of Lord Hale it is said, "Here is custom laid, and he relies not barely on the case without it." But it is a general, and not a local custom, applicable to all lands near the sea, and not to lands within any particular district. The pleadings do not state the lands to be within any district, and such a statement would have been necessary if the custom pleaded were local. The *consuetudo patriæ* means the custom of all parts of the country to which it can be applied; that is, in the present case, all such parts as adjoin the sea.

The case of *The King v. Oldsworth*, Hale de Jure Maris, p. 14, confirms that of the *Abbot of Peterborough* as to the right of the owner of the adjoining lands to such lands as were "secundum majus et minus prope tenementa sua projecta" (p. 29). That case was

Rule
customs
related to
all land
adjoining
the sea.

decided against the owner, because he also claimed derelict lands against the Crown.

Here it will be observed that there is a distinction made between lands derelict and lands formed by alluvion; which distinction, I think, is founded on the principle that I have ventured to lay down, namely, that alluvion must be gradual and imperceptible; but the dereliction of land by the sea is frequently sudden, leaving at once large tracts of its bottom uncovered, dry, and fit for the ordinary purposes for which land is used. But still what was decided in this case is directly applicable to the question proposed to us. The Judges are, therefore, warranted by justice, by public policy, by the opinions of learned writers, and the authority of decided cases, in giving to your Lordships' question the answer which they have directed me to give.

My Lords, the answer to your Lordships' question is the unanimous opinion of all the Judges who heard the arguments at your Lordships' bar. For the reasons given in support of that opinion, I alone am responsible. Most of my learned brothers were obliged to leave town for their respective circuits before I could write what I have now read to your Lordships. I should have spared your Lordships some trouble if I had had time to compress my thoughts; but I am now in the midst of a very heavy Nisi Prius sittings, and am obliged to take from the hours necessary for repose the time that I have employed in preparing this opinion. If it wants that clearness of expression which is proper for an opinion to be delivered by a Judge to this House, I hope that your Lordships will consider what I have stated as a sufficient apology for this defect.

THE LORD CHANCELLOR. My Lords, I beg to express my thanks to the learned Chief Justice, and to the Judges, for the attention they have paid to this subject; and I have only to add that I entirely concur in the conclusion at which they have arrived; and I would recommend to your Lordships, as a necessary consequence of the opinion which has been expressed, that the judgment of the Court of King's Bench upon the matter should be affirmed.

EARL OF ELTON. My Lords, I heard only part of the argument, and therefore, I have some difficulty in stating my opinion in this case; but having had my attention called to subjects of the same nature on former occasions, it does appear to me, I confess, after reading the finding of the jury, that the opinion of the Judges must be that which the learned Chief Justice has now expressed. I therefore concur in the opinion the Lord Chief Justice has expressed.

Judgment affirmed.¹

¹ See *Barney v. Keokuk*, 94 U. S. 324; *Nebraska v. Iowa*, 143 U. S. 359; *In the Matter of City of Buffalo*, 206 N. Y. 319; *In the Matter of The Hull and Selby Ry.* 5 M. & W. 327.

In *Steers v. City of Brooklyn*, 101 N. Y. 51 (1885), EARL, J., said, p. 56: "When soil is by natural causes gradually deposited in the water opposite upland, and thus the water-line is carried further out into the ocean or other

Land by alluvion belongs to owner for it is slowly formed & imperceptible. Land by derelict. belongs to crown for formed suddenly & fit at once for ordinary purpose for which lands are used.

public water, it becomes attached to the upland, and the title of the upland owner is still extended to the water-line, and the accretion thus becomes his property. Natural justice requires that such accretion should belong to the upland owner so that he will not be shut off from the water, and thus converted into an inland rather than a littoral owner."

In *Attorney-General v. Chambers*, 4 De G. & J. 55, 67-69 (1859), LORD CHELMSFORD said: "There is nothing, however, in any of the cases, or in the few text writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to determine whether there is any ground for this distinction, it is essential to discover, if possible, the principle upon which the right to *maritima incrementa* depends.

"The law is stated very succinctly by Blackstone, vol. 2, p. 262, in these words: 'As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, reciprocal consideration for such possible charge or loss; but if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King, for as the King is lord of the sea, and as owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.'

"I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson, in the case of *The Hull and Selby Railway Company*, 5 M. & W. 327, viz., 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle' as to gradual accretion 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighboring lands of another proprietor. Whatever may be the nature and character of these operations, they ought not to affect a rule which applies to a result and not to the manner of its production.

"Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the sea-shore, however difficult such proof of intention may be." See *Kansas v. Meriwether*, 182 F. R. 457; *Saunders v. N. Y. C. & H. Rd. Co.*, 144 N. Y. 75.

It was held in *Lovington v. St. Clair County*, 64 Ill. 56, affirmed 23 Wall. (U. S.) 46, that title to land made gradually by alluvion, passed to the riparian owner, although the accretion was aided by artificial structures on the land of other persons. *Brundage v. Knox*, 279 Ill. 450; *Adams v. Roberson*, 97 Kan. 198; *Tatum v. St. Louis*, 125 Mo. 647, accord.

FOSTER v. WRIGHT

L. R. 4 C. P. D. 438. 1878.

MOTION for judgment.¹Action to try the right of fishing in part of the River Lune.

The claim alleged that the plaintiff was the owner of the Camp House Farm, abutting on the river, and of the whole bed of the river abutting on the farm; that he also claimed in the alternative a several fishery, and likewise in the alternative a free fishery in that part of the river; that he also claimed the bed of the river and the said rights of fishing as lord of the honor and manor of Hornby, which comprised the river and the bed thereof; and that the defendant had committed divers trespasses by entering upon the bed of the river and fishing therein, and preventing the plaintiff from fishing therein.

The defence alleged (*inter alia*) that the defendant and those whose estate he had, were the owners of the Snabhouse estate, abutting on the river, and that the grievances complained of consisted of acts of fishery and other acts done by the defendant in that part of the river lying between its shore on the Snabhouse estate (opposite the Camp House Farm), and the middle of the bed of the river along the same part of the Snabhouse estate; the defendant denied that the plaintiff was owner or possessed of that part of the bed of the river. Issue.

At the trial before Brett, L. J., at the Lancashire Spring Assizes, 1878, it appeared that no facts were substantially disputed except as to a question of boundary, viz., the extent to which the River Lune had encroached upon the land of the defendant. Some encroachment was admitted, and the parties arranged that the question of boundary should thereafter be settled between them, and that the plaintiff should move for judgment upon the facts proved and admitted, of which those material were as follow.

The river Lune, which is neither tidal nor navigable, flows through the manor or honor of Hornby, in Yorkshire. From an inquisition *post mortem* taken in the thirteenth year of Edw. I., it appears that one Sir Geoffrey de Neville held the manor with the appurtenances, and that he "also held the fishery of all the waters of Hornby." The manor passed down into the possession of George Earl of Cardigan, who in 1711 enfranchised some land in the township of Grassingham within the manor. This land, called Wood's Ayre, did not then abut on the river.

By the deed of enfranchisement the lord excepted and reserved from the grant of the premises his seigniorial rights and services,

¹ This report was postponed pending an appeal. The case came before the Court of Appeal during the last sittings, but was there settled by the parties.

Pl. claims title to bed of river abutting his farm.

Pl. claims title to bed of river & that def. has trespassed & prevented pl. fishing

Defence:- Denied that pl. title to river.

?

Right to fish in river by grant.

tithes and compositions, and also all manner of free warrens. . . . Together also with free liberty of hunting, hawking, fishing, and fowling in and upon the premises or any part thereof, at seasonable and convenient times of the year. In 1780 the manor was forfeited on the attainder of its lord, Colonel Charteris, but was re-granted, with free liberty of fishing in all the waters of the manor, and in 1783 came into the hands of Mr. John Marsden. His heir-at-law, after establishing his right to it in the action of *Tatham v. Wright*, 2 Russ. & My. 1; 1 A. & E. (Ex. Ch.) 3, sold it, and the purchaser afterwards sold it to the plaintiff, who is now the lord of the manor.

Def. got enfranchised land.

The enfranchised land, Wood's Ayre, in the township of Grassingham, came into possession of the defendant. It is adjacent to the part of the manor lands belonging to the plaintiff and in the township of Tarleton. The boundary of the townships was also the boundary between the two properties.

Prior to 1838 the River Lune flowed wholly within these Tarleton lands of the plaintiff. It ran parallel to the defendant's land, but land belonging to the plaintiff was between the river and the boundary of the defendant's land.

River wearing away old bank & then dip. made embankment. D. claimed it. fish in river so formed.

From observations made and noted on a map by a steward of the defendant's predecessor in title, it appeared that between 1838 and June, 1843, the river had by invisible progress moved sideways towards the defendant's land and was wearing away the plaintiff's land which intervened. By November, 1843, it had moved further in the same direction, and it continued to do so until it encroached to some extent upon the land of the defendant, who, in 1853, stopped further encroachment by making an embankment. As a strip of his land now formed part of the river bed, he claimed a right to go upon that part to catch salmon which came there, and in assertion of such right he committed the acts alleged by the plaintiff to be trespasses.

Cur. adv. vult.

July 3. LINDLEY, J. The plaintiff in this case is lord of the manor of Hornby, and claims the exclusive right to fish in the River Lune between two points where that river is neither tidal nor navigable; and before the enfranchisement hereafter mentioned, the river between those points was locally situate within the manor of Hornby.

grant of fishing rights to predecessor of def.

This manor formerly belonged to the Crown. In the reign of Edward I. it was granted, with the right to fish in all the waters of the manor; and it remained in private hands for several centuries. In the year 1711 certain lands held of the manor, but not abutting on the river, were enfranchised, and these lands now belong to the defendant. After this enfranchisement the manor became forfeited to the Crown; but it was re-granted, with the free liberty of fishing in all its waters, to the predecessors in title of the plaintiff.

From the earliest times, the lands adjoining the river on both sides of it belonged to the lord; and such was the case both when the defendant's lands were enfranchised, and when the manor was re-granted by the Crown as above mentioned. In other words, until comparatively modern times, the river did not abut on the lands of the defendant. Neither when the defendant's lands were enfranchised, nor when the manor was re-granted out, did any part of the river either abut on or flow through the defendant's lands. Under these circumstances I am unable to see that the deed of enfranchisement has any bearing on the case. That deed reserved to the lord whatever rights of fishing he had in any water flowing through or bounding the lands enfranchised; but it did no more, and at the date of the enfranchisement the Lune was not one of such waters; neither did the re-grant from the Crown confer upon the grantee of the manor any right to fish in the river as distinguished from any other waters of the manor.

The counsel for the defendant suggested that the terms of the new grant did not confer on the grantee any right of fishery, except as incidental to the ownership of the land on the banks and under the river; but it was conceded that as the river was then situate, the grantee from the Crown acquired such ownership; and, in the view which I take of this case, it is not material to determine whether the grantee acquired his exclusive right to fish in the river as an incident to the ownership of the bed of the river, or whether he acquired an exclusive right to fish independently of such ownership.

Since the re-grant of the manor, the course of the river between the points above referred to has gradually changed; its bed has gradually approached nearer and nearer to the defendant's land; and now some portion of that land has become part of the river bed. This part can still be identified, and its boundary can be ascertained. The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property.

I am of opinion that it does. The change of the bed of the river has been gradual; and although the river-bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. Under these circumstances, I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner.

Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex v. Yarborough*, 3 B. & C. 91; 5 Bing. 163; and, conversely, land gradually encroached upon by water ceases to belong to the former owner: *In re Hull and Selby Ry. Co.*, 5 M. & W. 327. The law on this subject is based upon the

In early times before belonged to Crown & didn't abut on def. lands

Deed of enfranchisement to def. is not material to the case.

Pl. grantee of crown got rt. to fish in river & is immaterial whether it was incident to ownership or exclusive

? Does pl. exclusive rt. to fish extend over water flowing over land which can be identified as formerly def.

Pl. legal owner of River bed.

grantee of manor had no rt. to fish in river any more than other

River near D.

Pl. rt.

2d. title to river bed
free because hard to
tell small
additions to
or subtractions

Gen. rule
says title
remains in
river bed even
if it is gradual
accretion.

impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shows this to be the case. Our own law may be traced back through Blackstone (vol. ii. c. 16, pp. 261, 262), Hale (De Jure Maris, cc. 1, 6), Britton (book ii. c. 2), Fleta (book iii. c. 2, § § 6, &c.), and Bracton (book ii. c. 2), to the Institutes of Justinian (Inst. ii. 1, 20), from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine, and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known, was scarcely contested by the counsel for the defendant, and is well settled. See the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost; and passages in Britton (*ubi supra*), in the Year-Books (22 Ass. p. 106, pl. 93), and in Hale, De Jure Maris (book i. c. 1, citing 22 Ass. pl. 93), were referred to in support of this view: *Ford v. Lacy*, 7 H. & N. 151, was also relied upon in support of this distinction. Britton lays down as a general rule that gradual encroachments of a river inure to the benefit of the owner of the bed of the river; but he qualifies this doctrine by adding, "If certain boundaries are not found." The same qualification is found in 22 Ass. pl. 93, which case is referred to in Hale, *ubi supra*. But, curiously enough, this qualification is omitted by Callis in his statement of the same case: see Callis, p. 51; and on its being brought to the attention of the court in *In re Hull and Selby Ry. Co.*, the court declined to recognize it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenterden's observations in *Rex v. Yarborough*, 3 B. & C. 106, are also in accordance with this view; and although Lord Chelmsford in *Attorney-General v. Chambers*, 4 De G. & J. 69-71, doubted whether, where the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Ry. Co.*, which decided the point so far as encroachments by the sea are concerned.

No diff.
between
& river.

Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal or navigable or non-navigable rivers; and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: De Jure Maris, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford v. Lacy* the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion; and I do not regard that case as throwing any real light on the question I am considering.

Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river-bed, I am of opinion that the plaintiff has that right; for if he was the owner of the old

bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title.

Pl. title to river bed remains even though gradual shifting of stream bed

But, supposing the plaintiff's right of fishing not to have been the consequence of his ownership of the soil, — supposing his to have had only a right to fish in the Lune, — I am of opinion that he has the same right of fishing in the river in its present bed as he had of fishing in the river in its old bed. I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose; nor is there any authority for holding them to be affected thereby. The *Mayor of Carlisle v. Graham*, Law Rep. 4 Ex. 361, is no such authority; for in that case the old and the new beds of the river existed as two distinct beds; the new bed was not, as here, formed by the old one gradually shifting its place: then, the water gradually left the old bed, and followed an entirely new course always distinguishable from the old; whilst here, there has been and is only one bed, and its change of place has only become perceptible after the lapse of years. The physical changes are totally different in the two cases.

Even tho' Pl. only had rt. to fish in river he can still do so even tho' bed shifted.

Whether, therefore, the exclusive right of the plaintiff to fish in the river in question is an incident to his ownership of the soil or is independent thereof, I am of opinion that he is still entitled to such exclusive right in the river as it now exists, and as it will exist if it continues gradually to change its course; and consequently I am of opinion that judgment ought to be entered for the plaintiff.

Held: - Pl.

LORD COLERIDGE, C. J. I have had the advantage of reading the judgment prepared by my Brother Lindley, and I entirely concur in the result at which he has just arrived. Nor should I add anything, but that I am not quite satisfied to base my conclusion so much as he does upon the proposition that the grant of the fishery, in such terms as are used in the two grants in this case, carries with it the right of the soil, and that the soil therefore of the River Lune as it varies gradually from time to time passes irrespective of the *medium filum* to the plaintiff. I do not say that it does not, but I am not satisfied that it does. If the whole soil over which the River Lune flowed passed by the first grant, and, after the death of Colonel Charteris, by the second to the predecessor in title of the plaintiff, I think the consequence as to gradual accretion, which my Brother Lindley draws from that premise, does in legal reasoning follow from it. But I confess I somewhat doubt the premise. The safer ground appears to me to be that the language as to the fishery in both the earlier and the later grants conveys what it expresses, — a right to

Pl.

Rule

take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, i. e., as I understand the phrase, a right to take fish in alieno solo, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case are proved or admitted to have been.

I agree, for the reasons given by my Brother Lindley, that the case of *Mayor of Carlisle v. Graham* is distinguishable from the case before us; and upon these grounds, I concur in thinking that our judgment should be made for the plaintiff.

*Judgment for the plaintiff.*¹

¹ Compare *Randolph v. Hinck*, 277 Ill. 11.

In *Hindson v. Ashby*, L. R. [1896] 2 Ch. 1, plaintiff's predecessors acquired a piece of land bounded on one side by the river Thames. The land ended in an almost perpendicular bank five or six feet high, to which the water reached. The water later receded, and a deposit took place at the foot of the bank. The court did not consider it necessary to decide whether the plaintiffs were entitled to this deposit as an accretion, but it intimated that they were not. LINDLEY, L. J., said, page 13: "Whether, apart from the statute of limitations, the accretions, or the land left by the water, can become the property of the plaintiffs or cease to be the property of the defendant, is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hale, De Jure Maris, c. i. and vi., and the Year-Book, 22 Ass. fo. 106, pl. 93, to shew that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the waterside is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself. The cases of *Rex v. Lord Yarborough*, affirmed by the House of Lords in *Gifford v. Lord Yarborough* and *In re Hull and Selby Ry. Co.*, seem opposed to those authorities, if applied to fluctuating water boundaries. The judgments in *Scratton v. Brown* point in the same direction. On the other hand, *Attorney-General v. Chambers* seems the other way. But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

A. L. SMITH, L. J. said, p. 27: "I must add that I very much doubt if the plaintiffs can invoke the doctrine of accretion as applying to a case where, as here, the old line of demarcation between the plaintiffs' land and the river has always been in existence and still remains patent for all to see. I allude to the old 6 ft. bank.

"It cannot be denied that authority is to be found in the books, for instance, in Hale de Jure Maris, Britton, Fleta, Bracton, the Institutes of Justinian, and the Year-Books, all of which will be found referred to by Lindley, L. J., when Lindley, J., in his judgment in *Foster v. Wright*, and also in the judgment of Chelmsford, L. C., in *Attorney-General v. Chambers*, *Rex v. Lord Yarborough*, and in other cases, which would lead to the conclusion, that in a case with such metes and bounds ever existing as in the present, the doctrine of accretion would not apply.

"The case upon which the counsel for the plaintiffs relied to shew that al-

DEERFIELD v. ARMS

17 Pick. (Mass.) 41. 1835.

WRIT of entry to recover a parcel of land containing about five acres, recently formed by alluvial deposits on the margin and bed of Deerfield River. The land lies and has been formed in a bend of the river curving southerly and easterly from the river. The case was tried before *Shaw*, C. J.

The demandants claimed the land in question as owners of the land on the east bank of the river at the time of the accretion. The tenant claimed to hold it as an accretion to his own land lying higher up on the southerly and easterly side of the bend on the river.

though there might be metes and bounds, yet the doctrine of accretion did apply, was that of *Foster v. Wright*. In that case, in which the question was as to whether the owner of a fishery in a river could follow his fishery when the river gradually and imperceptibly changed its course and ate into the soil of another, although after many years the encroachment upon that other's soil could be identified, Lindley, J., held that it could be followed; and, if I may be permitted to say so, I agree with him; but that learned judge said: 'The change of the bed of the river has been gradual; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before.' This, I would point out, is not so in the present case; for, as before stated, the old 6 ft. bank has been ever standing where it is. There stands the old line of demarcation of the plaintiffs' land, and there it has stood clearly defined whenever the deposit of alluvium by reason of the silting up of sand became such as to be in itself apparent, and then and at that very moment, when the first, and indeed every subsequent accretion, became apparent, so also at the same identical time it became perceptible to the ordinary observer that the accretion so formed was no part of the plaintiffs' land.

"This certainly differentiates this case from *Foster v. Wright* in an essential particular; and, as at present advised, I doubt extremely whether the doctrine of accretion applies at all to the present case.

"The whole doctrine of accretion is based upon the theory that from day to day, week to week, and month to month a man cannot see where his old line of boundary was by reason of the gradual and imperceptible accretion of alluvium to his land. How can this apply to a case like the present, when the whole thing is at once patent?"

In *Widdcombe v. Chiles*, 173 Mo. 195, lot A, owned by the defendant, had originally been separated from the Missouri River by lot B. The river gradually washed away all of lot B and a part of lot A, and later gradually restored all of both lots and added land to what had originally been lot B. The original bounds of lot A were known. *Held*, that, when the intervening lot B had been washed away, lot A became riparian land, and the defendant was entitled to all the land so restored and added. *Accord*, *Welles v. Bailey*, 55 Conn. 292; *Peuker v. Canter*, 62 Kan. 363; *Yearsley v. Gipple*, 104 Neb. 88. *Contra*, *Ocean City Association v. Shriver*, 64 N. J. L. 550; *Allard v. Curran*, 41 S. D. 73. See *Bush v. Alexander*, 134 Ark. 307; *Bellefontaine Co. v. Niedringhaus*, 181 Ill. 426; *Grady v. Royar*, 181 S. W. (Mo.) 428.

One question, reserved for the opinion of the whole court, was whether the demandants had proved their title to the land on the east bank of the river in virtue of which title alone they could claim the accretion. This depended almost exclusively on the early records of the proprietors of the township of Deerfield, and the town and the parish surveys, grants, and other documents.

The tenant contended, that supposing the demandants' title to the land on the east bank to be established, still it would not entitle them to any part of the alluvial formation, because he maintained that he and those under whom he claimed had been in possession of some part of the alluvial formation for near sixty years; and that as it commenced making on the southwesterly side, it had never reached the east bank of the river, and therefore it could not be said to be an accretion to it. It was testified that between the eastern bank of the river, and the alluvial land in controversy, there is a low place into which a small brook falls; and that often there is water in it, but that sometimes it is dry.

If the court should be of opinion that the demandants were entitled to recover any part of the land in controversy, the amount and proportion to which they were entitled was to be determined by an assessor or commissioners, conformably to such rules as the court should establish.

SHAW, C. J., delivered the opinion of the court. There are several points in this cause to which it seems proper to allude in the outset, and upon which we entertain no doubt.

In the first place it seems very clearly settled that, upon all rivers not navigable (and all rivers are to be deemed not navigable above where the sea ebbs and flows), the owner of land adjoining the river is *prima facie* owner of the soil to the central line, or thread of the river, subject to an easement for the public to pass along and over it with boats, rafts, and river craft. This presumption will prevail in all cases, in favor of the riparian proprietor, unless controlled by some express words of description which exclude the bed of the river, and bound the grantee on the bank or margin of the river. In all cases, therefore, where the river itself is used as a boundary, the law will expound the grant as extending *ad filum medium aquæ*.

We also consider it as a well-settled principle of law, resulting in part from the former, that where land is formed by alluvion, in a river not navigable, by slow and imperceptible accretion, it is the property of the owner of the adjoining land, who for convenience, and by a single term, may be called the riparian proprietor. And in applying this principle, it is quite immaterial whether this alluvion forms at or against the shore, so as to cause an extension of the shore or bank of the river, or whether it forms in the bed of the river and becomes an island. And where an island is so formed in the bed of a river as to divide the channel and form partly on each side of the thread of the river, if the land on the opposite sides

of the river belong to different proprietors, the island will be divided, according to the original thread of the river, between the rival proprietors.

This view of the subject disposes of one of the questions of fact, in relation to which some evidence was given; namely, whether the alluvial formation in controversy was separated by water from the eastern bank of the river, claimed by the demandants as riparian proprietors, or whether the newly formed land, at that point, extends quite to the eastern bank. We think this fact entirely immaterial to the rights in controversy between these parties.

But by far the most difficult question in this cause, is, whether the demandants have established a title to the land lying on the easterly bank of the river at the place in question, so as to constitute them riparian proprietors, in which character alone they can maintain the claim which they assert in this action. It is true that the title to the land on the easterly side of the river is not claimed by the defendant; still, the demandants must recover by the strength of their own title and not by the weakness of the defendant's, and as the demandants aver that they are seised of this land, and this averment is material to their title, and is traversed and put in issue by the defendant, it is a fact to be proved. As, however, no counter title is set up by the defendant, it is obvious that a *prima facie* title will be sufficient.

[The Chief Justice here went into an examination of the evidence of the demandants' title to the land on the eastern side of the river at the place in question, drawing the conclusion that they were seised of the same. He then proceeded:]

Considering that the town have established their title as riparian proprietors to a certain portion of the alluvial formation in question, it only remains to inquire how it shall be divided. This is a curious, and in many aspects in which it may be presented would be a very difficult, subject, as well as the analogous one of the division of flats, or land bounding on salt water, over which the tide ebbs and flows, among coterminous riparian proprietors, were it necessary to prescribe a general rule applicable to all supposable cases. But I do not think it necessary to discuss this subject at large, because the circumstances of the present case do not require it.

As neither of the riparian proprietors can establish any claim superior to the other, it is manifest that the newly acquired land must be divided equally between the parties, in proportion to the land which they respectively hold as riparian proprietors, and in virtue of which the law attributes to them this acquisition.

The facts of the present case show, and it appears by the plan, which is made part of the case, that the alluvion is formed in a bend of the river, extending along in front of the lands of several different owners.

The object is, to establish a rule of division among these pro-

prietors, which will do justice to each, where no positive rule is prescribed, and where we have no direct judicial decisions to guide us. The case most analogous to the present, which has occurred in this Commonwealth, is that of the division of flats ground, among coterminous proprietors, conformably to the general principle laid down in the Colony ordinance, giving to the proprietors of lands bounding on salt water, where the tide ebbs and flows, propriety to low-water mark, with some qualifications. *Rust v. Boston Mill Corp.*, 6 Pick. 158; *Emerson v. Taylor*, 9 Greenl. 44. In both cases we think two objects are to be kept in view in making such an equitable distribution; one is, that the parties shall have an equal share in proportion to their lands, of the area of the newly formed land, regarding it as land useful for the purposes of cultivation or otherwise, in which the value will be in proportion to the quantity; the other is, to secure to each an access to the water, and an equal share of the river-line in proportion to his share of the original line of the water, regarding such water-line in many situations as principally useful for forming landing-places, docks, quays, and other accommodations with a view to the benefits of navigation, and as such constituting an important ingredient in the value of the land. Without attempting to establish a rule of general application, we think that the one which shall most nearly, in general, accomplish these two conditions, will come nearest to doing justice.

A rule which appears to us to be applicable to the present case and meets the required conditions, is found in a work of the civil law, cited by the learned counsel who opened the case for the demandants, entitled "A Collection of New Decisions," by Denisart, published in France in 1783. It is in the form of a dictionary, and this subject is discussed under the title, *Attérissement*.

The rule suggested in this work is founded upon the obvious consideration already alluded to, that in many cases lands which border upon navigable rivers derive a great part of their actual value from that circumstance, and from the benefit of the public easement thereby annexed to such lands; and that being wholly deprived of the benefit of that situation would operate as a great hardship and do real injustice to a riparian proprietor, although he should obtain his full proportion of the land measured by the surface. This injustice will be avoided by the proposed rule, in conformity with which each proprietor will take a larger or smaller proportion of the alluvial formation, and of the newly formed river or shore line, according to the extent of his original line on the shore of the river.

The rule is, 1. To measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line. 2. The next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts,

and appropriate to each proprietor as many portions of this new river line as he owned rods on the old. Then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. The new lines, thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals or exceeds or falls short of the old.

This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion; and the rule is obviously founded in that principle of equity upon which the distribution ought to be made. It may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin if it happens to be elongated by deep indentations or sharp projections. In such case it should be reduced, by an equitable and judicious estimate, to the general available line of the land upon the river. We are not aware that in the present case any such modification will be necessary, and therefore the general rule may be applied, and will do justice between the parties.¹

¹ *Malone v. Mobbs*, 102 Ark. 542; *Reeves v. Moore*, 105 Ark. 598; *Peoria v. Central Bank*, 224 Ill. 43 (but see *Kehr v. Snyder*, 114 Ill. 313); *Berry v. Hoogendoorn*, 133 Iowa, 437; *DeLassus v. Faherty*, 164 Mo. 361; *Miller v. Lloyd*, 275 Mo. 35; *Batchelder v. Keniston*, 51 N. H. 496; *Hathaway v. Milwaukee*, 132 Wis. 249, accord.

See *Jones v. Johnston*, 18 How. (U. S.) 150; *Johnston v. Jones*, 1 Black (U. S.) 209; *Nirdlinger v. Stevens*, 262 F. R. 591; *Delord v. New Orleans*, 11 La. Ann. 699; *Smith v. Leavenworth*, 101 Miss. 238; *Benne v. Miller*, 149 Mo. 228; *Gorton v. Rice*, 153 Mo. 676.

The rules on the cognate subject of dividing flats are given in a note by the reporter to the case of *Commonwealth v. Roxbury*, 9 Gray (Mass.) 451, 521-523.

See *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544, where it is said, p. 552: "In ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel, or lowest and deepest part of the stream."

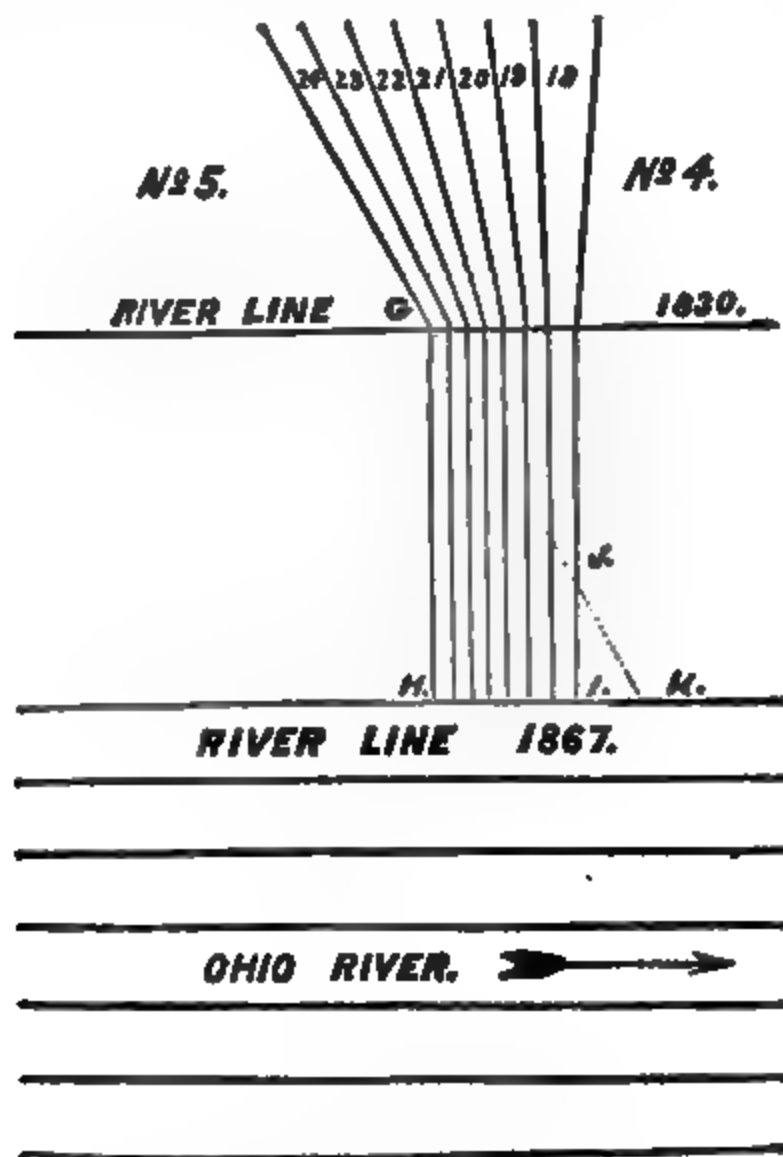
An accretion to islands, see *Wilson v. Watson*, 144 Ky. 352; *Archer v. Southern Ry. Co.*, 114 Miss. 403. On division between island and mainland proprietors, see *Menominee Co. v. Seidl*, 149 Wis. 316; Ann. Cas. 1914 A 483; Ann. Cas. 1918 E 1000. Islands attached to shore by accretion, 6 L. R. A. n. s. 194. Islands newly formed, 35 L. R. A. n. s. 229; Bracton Lib. II. c. 2 Fol. 9 A; De Jure Maris, 17.

MILLER v. HEPBURN

8 Bush. (Ky.) 326. 1871

JUDGE HARDIN delivered the opinion of the court.

The appellees, claiming title as the children and representatives of William Preston, deceased, to some lots of ground in the city of Louisville, situated near the foot of Jackson Street, and between Fulton Street and the Ohio River, instituted their actions against the appellants in June, 1867, for the recovery of parts of the lots then in the defendants' possession, they owning and occupying an



adjacent lot, which, with those of the plaintiffs and the interference in controversy, is shown by the diagram here inserted; the plaintiffs owning in the largest lot, No. 4, the lots in controversy, which when laid off in 1830 abutted on the *then* line of the river at the letter G, but now, as contended by the appellees, are in consequence of an alluvion formed in front of them, and the consequent recession of the river, prolonged to the present water-line at the letter H; while the defendants, who own the lot No. 5, claim that as the accretion was formed and the river receded, their west line, which

terminated originally at the letter G, was gradually extended till it reached the present water-line at the letter K, crossing each of the plaintiffs' lots extended, as claimed by them, so that the ground in dispute is that indicated by the letters G, H, I, J.

The defences involved both a denial of the alleged title of the plaintiffs and an assertion of right in the defendants for substantially the following reasons: *First*, that the law continued the natural course of their side-line from the point G towards K as the river receded; *second*, that as the accretion was formed, said line was extended and adopted by the concurrence and acquiescence of the owners and tenants in possession of the adjacent lots; *third*, that the plaintiffs were barred by continued adverse possession of the ground in controversy.

The court was of the opinion that plaintiffs, as *riparian* proprietors of their lots originally fronting on the river, were entitled to the land added thereto by accretion, to be ascertained by extending the original river frontage of the respective lots, as nearly as practicable, at right angles with the course of the river to the thread of the stream, and rendered judgments in accordance with that conclusion; and these appeals are prosecuted for the reversal of those judgments.

The first question to be decided is, whether the rule adopted by the court for determining the extent of the plaintiffs' recovery, if they were entitled to recover at all, was correct. In the very able and ingenious argument of the counsel for the appellants in this court, the general principle is not questioned that in ascertaining the rights of a *riparian* proprietor no importance should be given to the quantity or figure of his entire tract, nor the course of its side-lines; and we presume it unnecessary to resort to authority or illustration to prove that the appellants could not acquire title to the ground in controversy merely because of the oblique direction of the western side-line of their lot with reference to the general course of the river. But it is insisted for the appellants, in substance, that the court erred in adopting an arbitrary method of determining the relative rights of the parties by extending the side-lines of the plaintiffs' lots from their respective original *termini* on the shore as nearly as possible at right angles with the course of the river to the centre of the stream, instead of so drawing the lines as to give to each *riparian* proprietor such a proportion of the alluvial soil as the total extent of his front-line bears to the total quantity of the alluvial soil to be divided, without regard to the general course of the river or the centre of the stream; and we are referred to the cases of *Deerfield v. Arms*, 17 Pickering, 41; *Jones et al. v. Johnston*, 18 Howard, 150; *Johnston v. Jones et al.*, 1 Black, 209, as authority for this method of equitable apportionment.

In the first cited case it does not distinctly appear whether Deerfield River, on which the alluvion was formed, was technically and

according to the common law a navigable stream; all rivers being thereby deemed not navigable "above where the sea ebbs and flows." But it is apparent from the reasoning of the court in that case, as well as the other two cases cited, that the rules intended to be applied were those usually adopted for determining the relative rights of riparian owners of the banks of navigable rivers and lakes, and the division of flats on the sea-shore, or on coves in which the tide ebbs and flows. And as is properly said in the able and lucid opinion delivered by the special judge who decided these cases in the court below: "The rules thus laid down may be eminently proper in the division of the accretion upon the shores of navigable streams where the tide ebbs and flows, because the proprietor adjoining the edge of such river only owns to the water's edge, and low water is the end of the line; and hence, as the shore changes, the respective lines on such shore must change; but in a river not navigable — that is, where the tide does not ebb and flow — the proprietor does not stop at low water, but by permission and sufferance of the State he goes to the middle of the stream, and must have his shore-front to the middle; and it is a matter of little consequence whether islands are formed, or whether there is an accretion on the shore, or whether the water remains as it was when he received his grant; he is entitled to his front to the centre of the stream."

With reference to the distinction here taken, we are aware that jurists have differed in opinion whether in this country, as in England, the existence of tide water should be the test of navigability, so far as riparian rights may be involved, the Ohio and many other fresh-water streams being practically navigable, subservient to commerce, and subject to maritime jurisdiction, though above and unaffected by the tide. But whatever contrariety of authority there may be on that question, it may be regarded as settled in this State in favor of the common law rule since the decision of the case of *Berry v. Snyder, &c.*, 3 Bush, 266.

With a proper application of that rule in this case the solution of the question under consideration cannot be difficult. It does not appear that the general course and central thread of the river opposite to the ground in dispute cannot be ascertained under the judgment in these cases with sufficient certainty for practicable purposes; and if it be true, as in effect adjudged by the lower court, that the several owners of the river-bank at which the accretion was formed were entitled to an extension of the original river-fronts of their lots across the accretion, upon lines drawn as nearly as practicable at right angles with the centre of the river, the only difficulty would seem to be in determining the course on which these lines should be drawn with reference to each other and the thread of the river at the terminus of each of the lines, which would be necessarily parallel or convergent or divergent, as the relative lengths and courses of the original shore-line and central line of the river might differ.

The principle of equitable apportionment contended for by the counsel for the appellants is manifestly right when applied in the division between conterminous proprietors of an alluvion on a lake or sea-shore, or even on the bank of a river below tide-water, where the titles of the riparian owners are limited by the water's edge, and the law indicates no particular course for the extension or enlargement of their boundaries over the alluvial soil; but it is clearly inconsistent with the right of each owner of the bank of a river above tide-water to carry his title to the middle of the stream.

The conclusion of the Court of Common Pleas on this point is not, in our opinion, inconsistent with the adjudged cases cited as authority against it when properly applied, and it is moreover substantially sustained by several decisions, among which may be cited the cases of *Knight v. Wilder*, 2 Cush. 199; *Larrimer v. Benson*, 8 Mich. 18; and *Rice v. Ruddeman*, 10 Mich. 125.

But it is further contended for the appellants that whatever may have been the legal right of themselves and those under whom they claimed to prolong their western line over the accretion as it was formed, it *was* so prolonged according to its original course, and recognized and established as the true line by the adjacent owners and their tenants. It appears that Jesse Vansicles, under whom the appellants claim as remote vendees, took possession of the large lot, No. 5, in 1849 or 1850, and that he did at one time undertake to extend the line as it is now claimed by the appellants; but his right to do so was disputed by the tenants of the appellees, and the attempt was not persisted in, although then and afterward a path or roadway extended to the river near where the line would be as claimed by the appellants.

We are not satisfied from the evidence that the supposed continuation of the line was at any time sanctioned or agreed to by the appellees; but if it was, the agreement, whether express or implied, existing in parol only, did not divest the plaintiffs of their title. *Robinson, &c. v. Conn.* 2 Bibb, 124; *Smith v. Dudley*, 1 Littell, 66.

As to the question of limitation, it is sufficient to say that it does not appear that the appellants were in the adverse possession of the ground in controversy at an earlier period than 1860 or 1861, and the action was not therefore barred.

Wherefore, no error being perceived in the judgments, the same are affirmed.¹

¹ See *Calkins v. Hart*, 219 N. Y. 145.

Compare *Smith v. Johnson*, 71 F. R. 647; *Stark v. Meriwether*, 98 Kan. 10, 99 Kan. 650; *Newton v. Eddy*, 23 Vt. 319; *Hubbard v. Manwell*, 60 Vt. 235.

COOK v. McCLURE

58 N. Y. 437. 1874.

APPEAL from a judgment of the General Term of the Supreme Court in the Fourth Judicial Department, affirming a judgment in favor of defendant entered upon a verdict. Reported below, 2 N. Y. S. C. (T. & C.) 434.

This was an action of ejectment, brought to recover a small strip of land in Springville, Cattaraugus County, in the possession of the defendant, and upon which he had erected and maintained for some years a building, used for a storehouse.

The claim of the plaintiff was that the strip of land was formerly covered with the water of a millpond, caused by the backflow of the water of Spring Creek, by reason of the erection and maintenance of a milldam across said creek, erected and maintained for many years for the supply of a mill owned and operated by the plaintiff and those under whom she claimed. The plaintiff and defendant claimed under the same title and the same grantors. The premises owned by plaintiff were first deeded; the deed included the land covered by the pond. The boundary lines between the lands deeded and those subsequently conveyed and owned by defendant are given in the deed as follows: "Thence southerly along said line (*i. e.*, of land owned by the late Jarvis Bloomfield) to the corner-store standing in the southwest corner of said Bloomfield's land; thence south fifty-five degrees east to a stake near the high-water mark of the pond of the grist-mill; thence northeasterly along the high-water mark of said pond to the upper end of said pond, or to the north line of said lot number nine." Evidence was given, on the part of plaintiff, tending to show that the place where the defendant's store stood was covered at times, before he took title, by the waters of said pond, and that the ground was made in whole or in part by accretions of land and the subsidence of the waters of the pond, or the changes of the same, subsequent to the conveyance under which plaintiff claimed.

The court, among other things, charged the jury: "That where a man's boundary line is a stream of water, if natural causes added to the soil by accretion, the soil thus added belonged to the owner of the bank or shore." Also, "that if such natural accretion took place when the boundary line was a pond, such accretion belonged to the adjacent owner where the accretion was deposited." To which the counsel for the plaintiff duly excepted.

GROVER, J. The only questions in this case were upon the two exceptions taken by the appellant to the charge to the jury. The judge charged, that where a man's line is a stream of water, if natural causes added to the soil by accretion, the soil thus added belonged to the owner of the bank or shore. To this the appellant

excepted. He further charged, that if such natural accretion took place where the boundary line was a pond, such accretion belonged to the adjacent owner when the accretion was deposited.

The first proposition charged it is scarcely necessary to discuss, as the question involved in the case is more distinctly presented by the exceptions taken to the second. That question is, whether, under the facts of this case, the boundary in the deed under which the plaintiff, by several mesne conveyances, makes title, establishes a fixed and permanent line, or whether such line would follow a change in the water of the pond if produced by natural causes. The proof shows that at the time of the conveyance the grantor owned all the lands claimed by both parties. He conveyed the land claimed by the plaintiff, describing the disputed boundary as follows: Commencing (for this purpose) at a store lately owned by Jarvis Bloomfield, standing in the southwest corner of his lot, thence south fifty-five degrees east one chain and seventy-nine links to a stake near the high-water mark of the pond of the grist mill, thence northeasterly along the high-water mark of said pond to the upper end of said pond, or to the north line of said lot number nine. The question is as to this last boundary. The pond was an artificial one, raised by a dam across a running stream, for the purpose of creating power to propel the machinery of mills then owned by the grantor and included in the deed. The proposition where the boundary is upon a stream is correct, with the qualification that such accretion of alluvium, to inure to the riparian owner, must be imperceptible; that the amount added in any moment could not be perceived. *Halsey v. McCormick*, 18 N. Y. 147; 3 Kent, 428; Angell on Watercourses, § 53 and note. I do not think that there is any distinction in this respect between a boundary upon a running stream of water and a pond. Failing to make this qualification may not have prejudiced the appellant. If his counsel thought it would, he should have called attention to it, and requested a modification of the charge in this respect.

But this does not reach the real question in the case; that is, whether the boundary was not made by the deed fixed and permanent, so that if the water from natural causes encroached upon the land beyond high-water mark, as it was at the time of the giving the deed covering a portion of such land, the land so covered would not have remained the property of the grantor; and whether, on the other hand, if the water of the pond, from such causes, had receded so as to leave dry land below the then high-water mark, such land would not be the property of the grantee, or whether the line would continue to be the high-water mark of the pond as changed by such causes. It may be remarked that the reason given in the cases where the boundary is upon the banks of the stream that it should go to low-water mark, and in some cases for giving the alluvium insensibly formed to the riparian owner,—that the party should

not be cut off from, but continue to have access to the water for use,—has no application to the case. The line was fixed at the high-water mark of the pond. Hence the grantor reserved to himself no interest whatever in the water or the land covered by it. He could not, without trespassing, reach the water at all, only when at high-water mark, and then he had no right to or in it for any purpose. The land between high and low water mark clearly passed to the grantee under the deed. Again, the grantor was under no obligation to keep up the dam or pond. He could cut down the dam and use the land for any purpose he chose. Should the pond from any cause fill up along the disputed boundary, he had the right of clearing it out up to the line. Had the bank been partially washed away by the action of the water, the grantor had the right of filling in to the line. But these rights would not exist, should the line be held to continue at high-water mark, as that might from time to time be changed by the action of the water from natural causes. This right, claimed by the defendant, of acquiring title by accretion, if it existed, could be terminated by the plaintiff by a removal of the dam. I think the language of the deed indicates a clear intention to establish a fixed and permanent line, and not one changeable by the changes in the high-water mark of the water in the pond. It follows that the charge, when applied to the facts in this case, was erroneous. The boundary between the parties was the high-water mark at the time of the deed to Bradley, and the jury should have been so charged. Whether alluvium had been formed had nothing to do with the case. The evidence was such that the jury may have found that the land in dispute was alluvium, formed by the natural action of the water below this line; and if so, under the charge they would have found it was the defendant's; while if the fact was so, the title was in the plaintiff.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

All concur, except CHURCH, C. J., not voting. *PL*

Judgment reversed.¹

¹ See *Eddy v. St. Mars*, 53 Vt. 462.

Boundaries on navigable lakes or ponds. *Brundage v. Knox*, 279 Ill. 450; *State v. Gilmanton*, 9 N. H. 461; *Austin v. Rutland Rd. Co.*, 45 Vt. 215.

Boundaries on non-navigable lakes or ponds. *Hardin v. Jordan*, 140 U. S. 371; *Lamprey v. Minnesota*, 52 Minn. 181; *Tucker v. Mortenson*, 126 Minn. 214; *Brignall v. Hannah*, 34 N. D. 174; *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605.

In *Boorman v. Sunnachs*, 42 Wis. 233, it was said that an abutter on a natural pond, the soil of which is in the state or the United States, acquires title to land left by imperceptible reliction. *Fuller v. Shedd*, 161 Ill. 462; *French Live Stock Co. v. Springer*, 35 Or. 312, accord.

In *Hodges v. Williams*, 95 N. C. 331, it was held that if the bed of a natural pond had been granted by the state, an abutter on the pond would not acquire title to land left by gradual reliction; and it was said that the same would be true in the case of unnavigable streams.

CHAPTER II

LAPSE OF TIME

SECTION I

STATUTES OF LIMITATION

A. Statutes

ENGLAND

3 EDW. I, c. 39 (1275).—And forasmuch as it is long time passed since the writs undernamed were limited; it is provided, That in conveying a descent in a writ of right, none shall presume to declare of the seisin of his ancestor further, or beyond the time of King Richard, uncle to King Henry, father to the King that now is; and that a writ of *Novel disseisin*, of Partition, which is called *Nuper obiit*, have their limitation since the first voyage of King Henry, father to the King that now is, into Gascoin. And that writs of *Mortdancestor*, of Cosinage, of *Aiel*, of Entry, and of *Nativis*, have their limitation from the coronation clause of the same King Henry, and not before. Nevertheless all writs purchased now by themselves, or to be purchased between this and the feast of St. John, for one year complete, shall be pleaded from as long time, as heretofore may have been used to be pleaded.

21 JAC. I, c. 16, §§ 1, 2 (1623).—For quieting of men's estates, and avoiding of suits, be it enacted by the King's most excellent majesty, the lords spiritual and temporal, and commons, in this present Parliament assembled, That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, at any time hereafter to be sued or bought, of or for any manors, lands, tenements or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of Parliament: and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements or hereditaments; (2) and that all writs of *formedon in descender*, *formedon in remainder* and *formedon in reverter*, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first

descended or fallen, and at no time after the said twenty years;¹ (3) and that no person or persons that now hath any right or title of entry into any manors, lands, tenements or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or Statute to the contrary notwithstanding.

II. Provided nevertheless, That if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert, non compos mentis*, imprisoned or beyond the seas, that then such person or persons, and his or their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this Act; (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoveriture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.²

ILLINOIS

Annot. Stats. (1913) Chap. 83

§ 1. No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, except as hereinafter provided.

§ 2. If such right or title first accrued to an ancestor or predecessor of the person who brings the action or makes the entry, or to any person from, by, or under whom he claims, the twenty years shall be computed from the time when the right or title so first accrued.

§ 3.³ The right to make an entry or bring an action to recover

¹ See *Dow v. Warren*, 6 Mass. 328; *Tolson v. Kaye*, 3 Brod. & B. 217.

² See Stat. 3 & 4 Will. 4 c. 27; Stat. 37 & 38 Vict. c. 57; 34 Law Quar. Rev. 253; *Tichborne v. Weir*, 67 L. T. N. s. 735; *O'Connor v. Foley*, [1905] 1 I. R. 1.

³ Compare Hawaii, Rev. Laws (1915), § 2653; Michigan, Comp. Laws (1915), § 12313; Massachusetts, Gen. Laws (1920), c. 260, § 23.

*Admitted
to practice
in Illinois
1913*

land shall be deemed to have first accrued at the times respectively hereinafter mentioned, that is to say:

First—When any person is disseized, his right of entry or of action shall be deemed to have accrued at the time of such disseizin.

Second—When he claims as heir or devisee of one who died seized, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by the curtesy or other estate intervening after the death of such ancestor or devisor; in which case his right shall be deemed to accrue when such intermediate estate expires, or when it would have expired by its own limitations.

Third—When there is such an intermediate estate, and in all other cases when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time.

Fourth—The preceding clause shall not prevent a person from entering when entitled to do so by reason of any forfeiture or breach of condition; but if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred or the condition was broken.

Fifth—In all cases not otherwise specially provided for, the right shall be deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title upon which the entry or the action is founded.

§ 4.¹ Actions brought for the recovery of any land, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this State or the United States, or from any public officer or other person authorized by the laws of this State to sell such land for the non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken, as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title.

§ 5. The heirs, devisees and assigns of the person having such title and possession, shall have the same benefit of the preceding section as the person from whom the possession is derived.

§ 6.² Every person in the actual possession of land or tenements,

¹ See Arkansas, Dig. Stats. (1921), § 6947; Kentucky, Stats. (1915), § 2513; Washington, Code. (1919), § 7536.

² See Arizona, Rev. Stats. (1913), § 697; South Dakota Comp. Laws (1915), Code Civ. Proc. § 54; Washington, Code (1919), § 7538.

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under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

§ 7.¹ Whenever a person having color of title, made in good faith to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title. All persons holding under such tax-payer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes, as aforesaid, so as to complete the payment of taxes for the term aforesaid, shall be entitled to the benefit of this section: *Provided, however*, if any person, having a better paper title to said vacant and unoccupied land, shall, during the said term of seven years, pay the taxes assessed on said lands for any one or more years of the said term of seven years, then and in that case such tax-payer, his heirs and assigns, shall not be entitled to the benefit of this section.

§ 8.² The two preceding sections shall not extend to lands or tenements owned by the United States or of this State, nor to school and seminary lands, nor to lands held for the use of religious societies, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, *feme covert*, out of the limits of the United States, and in the employment of the United States or of this State: *Provided*, such person shall commence an action to recover such lands or tenements so possessed, as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land, shall within the time last aforesaid, pay to the person or persons who have paid the same, all the taxes, with interest thereon, at the rate of twelve per cent per annum, that have been paid on said vacant and unimproved land.

§ 9. If, at any time when such right of entry or of action upon or

¹ See Arkansas, Dig. (1921), § 6943; South Dakota, Comp. Laws (1915), Code Civ. Proc., § 55; Washington, Code (1919), § 7539.

² See South Dakota, Comp. Laws (1913), Code Civ. Proc., § 56; Washington, Code (1919), § 7540.

for land first accrues, the person entitled to such entry or action is within the age of twenty-one years, or if a female, of the age of eighteen years, or insane, imprisoned or absent from the United States in the service of the United States or of this State, such person or any one claiming from, by or under him or her, may make the entry or bring the action at any time within two years after such disability is removed, notwithstanding the time before limited in that behalf has expired.

§ 10. If the person first entitled to make entry or bring such action, dies during the continuance of any of the disabilities mentioned in the preceding section, and no determination or judgment has been had of or upon the title, right or action which accrued to him, the entry may be made or the action brought by his heirs or any person claiming from, by or under him at any time within two years after his death, notwithstanding the time before limited in that behalf has expired.

§ 11. No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues.¹

¹ See Illinois, Laws (1915), p. 495.

The statutory provisions in Colorado are similar to those in Illinois. Colorado, Annot. Stats. (1915), §§ 4650-4659.

In the following jurisdictions, if the adverse possessor holds under color of title, a shorter period is available for him. In some of them, good faith, or payment of taxes, or both, are also necessary to securing the benefit of the shorter term. Alaska, Annot. Code (1907), Code Civ. Proc., § 1042; Arizona, Rev. Stats. (1913), §§ 695, 697; Colorado, Annot. Stats. (1915), § 4655; Georgia, Annot. Code (1914), § 4169; Illinois, Annot. Stats. (1913), c. 83, § 6 *ante*, p. 27, and states in note² p. 27; North Carolina, Stats. (1919), § 428; Texas, Civ. Stats. (1913), §§ 5672, 5674. Compare North Dakota, Comp. Laws (1913), § 5471; *Ubanec v. Ubanec*, 174 N. W. (N. D.) 880.

Simple statutory provisions providing for the barring of entry or action or both for the recovery of real estate after a certain period, and for disabilities are to be found in the following jurisdictions: Arkansas, Dig. Stats. (1921), § 6942 (seven years); Connecticut, Revision (1918), § 6152 (fifteen); Delaware, Rev. Code (1915), §§ 4662-4665 (twenty); District of Columbia, Annot. Code (1919), § 1265 (fifteen); Hawaii, Rev. Laws (1915), §§ 2651-2658 (ten); Indiana, Annot. Stats. (1914), §§ 295, 298 (twenty); Iowa, Code (1913), §§ 3447, 3453 (ten); Kansas, Gen. Stats. (1915), §§ 6905, 6906 (fifteen); Kentucky, Stats. (1915), §§ 2505-2508 (fifteen); Maine, Rev. Stats. (1916), c. 110 (twenty); Massachusetts, Gen. Laws (1920), c. 260 (twenty); Michigan, Comp. Laws (1915), §§ 12311-12317 (fifteen); Minnesota, Gen. Stats. (1913), §§ 7696-7710 (fifteen); Missouri, Rev. Stats. (1919), §§ 1305-1314 (ten); Nebraska, Rev. Stats. (1913), §§ 7564, 7575 (ten); New Hampshire, Pub. Stats. (1901), c. 217 (twenty); New Mexico, Stats. (1915), § 3365 (ten); Ohio, Annot. Gen. Code (1912), § 11219 (twenty-one); Oklahoma, Rev. Laws (1910), §§ 4655-4656 (fifteen); Oregon, Laws (1920), §§ 4, 17 (ten); Pennsylvania, Purdon's Digest (1905), pp. 2268-2275 (twenty-one); Vermont, Pub. Stats. (1906), c. 78 (fifteen); Virginia, Annot. Code (1904), §§ 5805-5808 (fifteen); West Virginia, Annot. Code (1913), §§ 4414-4417 (ten);

NEW YORK

1920, Chap. 925, Art. 2.

§ 34. An action ¹ to recover real property or the possession thereof cannot be maintained by a party other than the people,² unless the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within twenty years before the commencement of the action.

A defense or counterclaim founded upon the title to real property, or to rents or services out of the same, is not effectual unless the person making it, or under whose title it is made, or his ancestor, predecessor or grantor, was seized or possessed of the premises in question within twenty years before the committing of the act with respect to which it is made.

§ 35. In an action to recover real property or the possession thereof, the person who established a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the legal title for twenty years before the commencement of the action.

§ 36. An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within twenty years after the time when the right to make it descended or accrued.

§ 37. Where the occupant or those under whom he claims entered into the possession of the premises under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for twenty years, under

Wyoming, Comp. Stats. (1910), §§ 4295, 4296 (ten). And see, Alabama, Code (1907), § 4834 (ten); Alaska, Code (1907) Code Civ. Proc., §§ 4, 1042 (ten); Tennessee, Annot. Code (1917), §§ 4448-4465 (seven).

In some states the statute expressly vests title in the adverse possessor after the period of limitation. Georgia, Annot. Code (1914), § 4168 (twenty); Mississippi, Annot. Code (1917), § 2458 (ten); North Carolina, Stats. (1919), § 430 (twenty); Rhode Island, Gen. Laws (1909), c. 256, § 2 (ten); Texas, Civ. Stats. (1913), § 5679 (three, five, ten). See Alaska, Code (1907), Code Civ. Proc., § 1042 (seven); New Jersey, Comp. Stats. (1913), vol. 3, p. 3172 (sixty, thirty); North Dakota, Comp. Laws (1913), § 5471 (ten) [see § 7362 (twenty)]; Tennessee, Annot. Code (1917), § 4456 (seven). Compare *Tichborne v. Weir*, 67 L. T. N. S. 735; *O'Conner v. Foley*, [1905] 1. I. R. 1.

¹ See *Humbert v. Trinity Church*, 24 Wend. 587.

² Secs. 31-33 deal with actions by the people or by a patentee or grantee of the people.

the same claim, the premises so included are deemed to have been held adversely; except that where they consist of a tract divided into lots the possession of one lot is not deemed a possession of any other lot.

§ 38. For the purpose of constituting an adverse possession, by a person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 39. Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

§ 40. For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where it has been protected by a substantial enclosure.
2. Where it has been usually cultivated or improved.¹

§ 41. Where the relation of landlord and tenant has existed between any persons the possession of the tenant is deemed the possession of the landlord until the expiration of twenty years after the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years after the last payment of rent; notwithstanding that the tenant has acquired another title or has claimed to hold adversely to his landlord. But this presumption shall not be made after the periods prescribed in this section.

§ 42. The right of a person to the possession of real property is not impaired or affected by a descent being cast in consequence of the death of a person in possession of the property.

§ 43. If a person who might maintain an action to recover real property or the possession thereof, or make an entry, or interpose a defense or counterclaim founded on the title to real property or to rents or services out of the same, is when his title first descends or his cause of action or right of entry first accrues, either:

¹ See *Clark v. Cochran*, 85 So. (Fla.) 250.

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life; the time of such a disability is not a part of the time limited in this article for commencing the action or making the entry or interposing the defense or counterclaim; except that the time so limited cannot be extended more than ten years after the disability ceases or after the death of the person so disabled.¹

B. *Operation of the Statute*

STOKES v. BERRY

2 Salk. 421. 1699.

If A. has had possession of lands for twenty years without interruption, and then B. gets possession, upon which A. is put to his ejectment, though A. is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession. Ruled *per* HOLT, C. J. The same point was ruled by HOLT, C. J., at Lent Assizes for Bucks, 12 W. 3, because a possession for twenty years is like a descent, which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment.²

SCHOOL DISTRICT NO. 4 IN WINTHROP v. BENSON
ET ALS.

31 Me. 381. 1850.

WRIT OF ENTRY. There was evidence tending to prove that the land formerly belonged to the ancestor of the defendants; and that the plaintiffs had occupied a portion, or the whole of it, for more than forty years, for a school-house, woodshed, and woodyard.

¹ The following states have modelled their acts on the New York statute: California, Code Civ. Proc. (1915), §§ 318-328 (five years); Florida Comp. Laws (1914), §§ 1718-1724 (seven); Idaho, Comp. Stats. (1919), §§ 6596-6606 (five); Montana, Rev. Codes (1907), §§ 6432-6442 (ten); Nevada Rev. Laws (1912), §§ 4952-4956 (five); North Dakota, Comp. Laws (1913), §§ 7362-7372 (twenty), see § 5471 (ten); South Dakota, Comp. Laws (1913), Code Civ. Proc., §§ 43-56 (twenty); Utah, Comp. Laws (1917), §§ 6449-6463 (seven); Wisconsin, Stats. (1915), §§ 4207-4218 (twenty).

² See *Armstrong v. Ristcau*, 5 Md. 256.

If A is in possession and is ousted by B, B cannot show title in a third person as a defence to ejectment. *Christy v. Scott*, 14 How. (U. S.) 282; *Bradshaw v. Ashley*, 14 App. Cas. (D. C.) 485; *Casey v. Kimmel*, 181 Ill. 154; *Adams v. Tiernan*, 5 Dana (Ky.) 394; *Cook v. Bertram*, 86 Mich. 356; *Jackson d. Duncan v. Harder*, 4 Johns. (N. Y.) 202; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Perry v. Clissold*, [1907] A. C. 73; *Waata v. Grice*, 2 N. Z. L. R. 95, 117; 3 Harv. L. Rev. 323-326.

It was proved that a wooden school-house was erected there by the plaintiffs in 1802; it was taken down and a brick school-house was built in 1818 on the lot, near the site of the wooden one. A woodshed was placed near the brick school-house in 1824. In 1847 one Samuel Wood was the school agent. He was called by the defendants as a witness, and testified that he procured the woodshed to be removed in the spring of 1847 from the northwesterly end of the school-house to the back side of the school-house at the other end; that he found the building must be removed; that it had been on another man's land on sufferance; that the defendants asserted a title, and showed it to him, and required the building to be removed; that he became satisfied the district had no title to the land, and that he removed the building for that reason. That the expense of removing it was \$25, which was paid by the town, out of the money assigned to that district.

The plaintiffs objected to said Wood's testimony, as not legally admissible, but the objection was overruled. It appeared, from the records of the district, that in June, 1847, soon after the removal of the shed, they had a meeting and took action for sustaining whatever claim they had to the land.

The defendants in their argument contended that if, in 1847, the agent of the school district, at the request of the defendants, removed the woodhouse to its present location, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges; then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover in this suit. The court, in opposition to the argument of the plaintiffs' counsel, gave such instructions.

The verdict was for the defendants, and the plaintiffs excepted.

WELLS, J. The jury were instructed that if, in 1847, the agent of the school district, at the request of the defendants, removed said woodhouse where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true, that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert

a dominion over the fee. But the terms open, notorious, adverse and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseisin, and the acts which they describe will have that effect if not controlled or explained by other testimony. *Little v. Libbey*, 2 Greenl. 242; *The Proprietors of Kennebec Purchase v. John Springer*, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseisin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same is barred by limitation. Stat. c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by a disseisin or by deed; it vests the fee-simple, although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof; and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it; and the appropriate mode of conveying it is by deed.

No doubt a disseisor may abandon the land, or surrender his possession by parol, to the disseisee, at any time before his disseisin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title, obtained by a disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands creates nothing more than an estate or lease at will. Stat. c. 91, § 30.

*The exceptions are sustained and a new trial granted.*¹

¹ See *Fant v. Williams*, 118 Miss. 428.

On the nature of the adverse possessor's title, see *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 542; *Price v. Lyon*, 14 Conn. 279,

HUGHES v. GRAVES.

39 Vt. 359. 1867.

THIS cause was an act of trespass *quare clausum fregit*, with counts in trespass on the case joined agreeably to the Statute. The action, by the agreement of the parties, was referred, to be decided according to law, and the defendant filed exceptions to the report of the referees.

On the hearing upon the said report and exceptions at the March Term, 1866, Kellogg, J., presiding, the court, *pro forma*, decided that the plaintiff was entitled to recover of the defendant the sum of ten dollars for his damages, as stated in the report, and rendered judgment in favor of the plaintiff on the report accordingly. To this decision and judgment the defendant excepted.

The referees reported as follows: "The plaintiff and defendant are severally the owners and occupiers of adjacent lots of land in the village of Fairhaven, both lots being originally parcels of an entire lot and each party deriving title to his lot from a common source. The west line of the plaintiff's lot, as shown by his title-deeds, runs from the northwest corner of his dwelling-house, southerly to the northwest corner of the Whipple lot. This line formed the eastern boundary of an ancient highway, discontinued more than fifty years since, running over the lot of the defendant. Joshua Quenton, an intermediate grantor of the plaintiff, obtained his title to the lot in 1806, and he and his heirs owned and occupied it until May, 1847. During this period the Quentons enclosed with a fence a strip of land about ten feet wide at the north end, which extended southerly and adjoining the plaintiff's west line from the said northwest corner of the plaintiff's dwelling-house, to and beyond the south line of the defendant's lot taken from said ancient highway, making a portion of their dooryard, and continued to occupy peaceably and adversely claiming it as their own for more than fifteen years. In the fall of 1847 an intermediate grantor of the defendant claims this strip of land, sawed the fence in two where the south line of the defendant's lot would strike it. But the fence after two or three months was rebuilt by the plaintiff's grantor, and the occupation in them continued till March, 1861, as the fence was

290; *Field v. Peeples*, 180 Ill. 376, 383; *LaSalle Coal Co. v. Sanitary Dist.*, 260 Ill. 423, 429; *Cadwalader v. Price*, 111 Md. 310, 319, 320; *Mortgage Co. v. Butler*, 99 Miss. 56, 70; *Armijo v. Armijo*, 4 N. M. 133; *Graffins v. Tottenham*, 1 W. & S. (Pa.) 488; *Jordan v. Chambers*, 226 Pa. 573; *Coal Creek Co. v. East Tennessee Co.*, 105 Tenn. 563, 574; *Earnest v. Little River Co.*, 109 Tenn. 427; *Doe v. Sumner*, 14 M. & W. 39; *Scott v. Nixon*, 3 Dr. & War. 388, 405, 407; *Rankin v. McMurtry*, 24 L. R. Ir. 290, 297, 303; *Atkinson & Horsell's Contract*, [1912] 2 Ch. 1. And see note p. 39 post

still standing when the plaintiff took possession under his deed, and when the defendant purchased his lot in April, 1862, he claimed it and in the summer of 1862 erected a store which extended eastward within about eight inches of the plaintiff's dwelling house and covered not only a portion of the strip of land so enclosed by the Quentons taken from the old highway and the plaintiff's lot, but also a small portion of land included within the boundaries of the plaintiff's lot. None of the deeds prior to the deed of Olive Kelsey, to I. Davey, of March 23d, 1860, by and through which the plaintiff claims title to his lot, in their boundaries included the piece of land enclosed by Quenton and taken from said old highway, and which actually formed part of the dooryard to the plaintiff's house. If the court shall be of opinion that the plaintiff takes nothing by Quenton's possessory title because the land so claimed was not included in the boundaries of his deed, then we only find for the plaintiff to recover of the defendant seven dollars damages and his costs, otherwise we find for the plaintiff to recover of the defendant ten dollars damages and his costs." ¹

The opinion of the court was delivered by

STEELE, J. The plaintiff is in actual possession and by his deed from Olive Kelsey is entitled to the benefit of her possession. Her possession was prior to any possession by the defendant or his grantors. The plaintiff will therefore maintain this action of trespass as against the defendant by virtue of mere prior possession, unless the defendant has a right to the possession. It is then the defendant's right and not the plaintiff's which we are required to examine. The defendant shows a faultless chain of title on paper, but it turns out he does not own the land. One Quenton acquired the ownership by fifteen years' possession adverse to the defendant's grantors. The defendant's chain of deeds represents nothing in the disputed land except what his grantors lost and Quenton gained. If Quenton's title had been by deed from the defendant or his grantors, it is clear the defendant could not lawfully have disturbed the plaintiff's prior possession. Quenton had no deed, but his adverse possession for the statutory period gave him an absolute indefeasible title to the land against the whole world on which he could either sue or defend as against the former owner. That being the case, is there sufficient virtue left in the defendant's paper title to warrant him in disturbing the plaintiff's possession? Under the present English Statute of Limitations it is settled there would not be. The case would stand precisely as if the defendant or his grantors had conveyed to Quenton. The plaintiff would be liable to be interrupted in his possession only by Quenton or some person under him. *Holmes*

¹ The deed Joshua Quenton to Olive Kelsey is dated May 25th, 1847. The deed Olive Kelsey to I. Davey, is dated March 23d, 1860. The deed I. Davey to the plaintiff, is dated August 25th, 1860. The two latter deeds embraced the land in question. — REP.

v. *Newland*, 39 E. C. L. 48 (11 A. & E. 44). In *Jakes v. Sumner*, 14 Mees. & Welsby, 41, Parke, B., remarking upon the present English Statute 3 & 4 W. IV. c. 27, says the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after the period of twenty years has elapsed. The several English Statutes, and their supposed points of difference, are commented upon in 2 Smith's Lead. Cases, 469, 559 *et passim*, and the case *Fenner v. Fisher*, Cro. Eliz. 288, is cited in *Holmes v. Newland*, *ubi supra*, as an authority under the previous Statutes against the application to *these* Statutes of the full extent of the rule applied to the Statute of William IV. Any extended discussion of these English Statutes would be unprofitable here, for our Statute, though mainly borrowed at the outset from the Statute of James, was somewhat modified when transferred to Vermont, and has been materially altered in form in passing through the several revisions to which our laws have been subjected. It now provides, after the section relating to *actions*, that "*no persons having right or title of entry into houses or lands shall thereinto enter but within fifteen years next after such right of entry shall accrue.*" The first section takes away the remedy, and the second the right. G. S. p. 442, §§ 1 and 2. The title is vested in the adverse holder for the statutory period, or, as is often said, "the adverse possession ripens into title." As a natural consequence, the former owner is divested of all the new owner acquires. This interpretation giving to adverse possession for fifteen years the effect of a conveyance, best accords with the other well-settled doctrines upon the subject of limitations as applied to real property. A covenant to convey perfect title is satisfied by conveying a title acquired under the Statute. In this country, as in England, an agreement made after the lapse of the statutory period to waive the benefit of the Statute is not effective, but the title remains in the party who has acquired it under the Statute, notwithstanding his waiver, until he conveys it back with all the solemnities required in any deed of land. In language of the books, "by analogy to the Statute of Limitations, we presume a grant of incorporeal rights after adverse uses for fifteen years." It would certainly be an artificial construction of the Statute which would make it a mere bar to the owner's right against the *person* only who occupied adversely. It relates to the rights of the party to the land. It makes no reference to *persons*. In this case, if the plaintiff's enjoyment of the land subjects him to an action or entry by Quenton on the ground that Quenton and not the defendant is the true owner, it ought not at the same time to subject him to action or entry by the defendant, on the ground that the defendant is the true owner of the land. We are satisfied that no title remains in the defendant, and that under our Statute he has no right to the possession. It has been held that a plaintiff in possession without right could maintain trespass against even the true owner for

adverse
possession

adverse =
title.

a disturbance, while the right of possession was in a third person by lease from the owner. *Phillips v. Kent and Miller*, 3 Zabriskie, N. J. Rep. 155. Here neither the right of possession nor the ownership was in the defendant.

The plaintiff claims that upon a correct construction of the deeds he has Quenton's title. This point we have not decided. The plaintiff's prior possession will enable him to recover as against the defendant whose grantors suffered Quenton to acquire the land by adverse possession for the statutory period. *Judgment affirmed*.¹

C. Disseisin and Adverse Possession.

LIT. § 279. And note that disseisin is properly, where a man entreth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold &c.

Co. LIT. 181 a. And note here that every entry is not disseisin, unlesse there be an ouster also of the freehold. And therefore *Littleton* doth not set down an entrie only but an ouster also, as an entry and a claimer, or taking of profits, etc.

1 ROLLE'S ABR. 659, PL. 5. If a man has a house, and locks it, and departs, and another comes to the house, and takes the key of the door into his hand, and says that he claims the house to himself in fee, and without any entry into the house, this is a disseisin of the house.

¹ See *Wilkes v. Greenway*, decided by the Court of Appeal (Lord Esher, M. R., Lindley and Bowen, L. JJ.), in 1890, and reported in 6 Times L. R. 449. The plaintiff admitted that the defendant had acquired by virtue of the Statute of Limitations title to certain premises surrounded by other land of the plaintiff, but denied that he had acquired a right of way by necessity to such land. The Master of the Rolls said: "The one point argued before us has been whether, assuming the premises to have passed to the defendant by virtue of the Statute of Limitations, a right of way over this approach inevitably came into existence over the plaintiff's remaining land as a way of necessity and as distinct from any other way. This point may be one which only becomes possible either on a statement of facts that is incomplete or assumptions of law that are not settled. On the hypotheses, however, so presented to us, and without further knowledge of the facts, we can only say that there is nothing in the Statute of Limitations to create ways of necessity. The Statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created either by express grant or by statutory enactment. The title to the premises is not a title by grant. The doctrine of a way of necessity is only applied to a title by grant, personal or parliamentary."

In *Schall v. Williams Valley R. R. Co.*, 35 Pa. 191, the court said that titles matured under the Statute of Limitations were not within the recording Acts. A. acquired such a title and then abandoned the possession of the land; B. purchased from the persons having the record title, without notice of A's rights. *Held*, that the title to the land continued in A.

See *Virginia Coal Co. v. Charles*, 251 F. R. 83, 156, 254 F. R. 379, 255 F. R. 992; *LaSalle v. Sanitary District*, 260 Ill. 423, 429; *Shaughnessey v.*

BLUNDEN v. BAUGH.

Cro. Car. 302. 1632.

ERROR of a judgment in the Common Pleas. Baugh brought an ejectment of lands in Blechingley of the demise of Charles Earl of Nottingham against Blunden. Upon Not guilty pleaded, a special verdict was found, that 39 Eliz. Charles Lord Howard, Lord Admiral, being seised of the said land in tail, by indenture covenanted, in consideration of marriage betwixt Sir William Howard his eldest son and heir and Elizabeth daughter and heir of Lord St. John, to suffer a recovery of those lands to the use of the said William and Elizabeth, and the heirs males of the body of the said William, with divers remainders over; that the marriage took effect, and the said William entered by the assent of his father and occupied at his will; and in 4 Jac. 1, by indenture demised that land to Thomas Humphrys and John Humphrys for twenty-one years, rendering £115 rent: they enter, and were possessed *prout lex postulat*: and being so possessed, the said Charles, then Earl of Nottingham, and the said William, then Lord Effingham, by indenture covenanted with Sir Robert Dormer and others (for that the said indenture of 39 Eliz. was not executed for the performance of the assurances and uses comprised therein) to levy a fine of those lands to the use of the said William Lord Effingham and Elizabeth, for a jointure for the said Elizabeth, and to the heirs males of the body of the said William, the remainder over as in the indenture, &c.; which fine was levied accordingly, and to the uses in the said indenture mentioned: that in 9 Jac. 1, the said William Lord Effingham died without issue male of his body; and John Humphrys died: and in 14 Jac. 1, Thomas Humphrys being seised or possessed *prout lex postulat*, by indenture enrolled within six months, in consideration of a competent sum of money, bargained and sold the said lands to Charles Lord Effingham, son and heir apparent to the earl, and his heirs. Charles Earl of Nottingham dies; Charles, now Earl of Nottingham, being his son and heir, entered. Blunden, the defendant, by the command of the said Elizabeth, entered and claimed it as her jointure. And Charles, now Earl of Nottingham, son and heir of the said Charles Earl of Nottingham the Lord Admiral, entered, and made a lease for three years to the plaintiff, who entered; and the defendant, as servant of the said Elizabeth, and by her command, ousted him. And if *super totam materiam* the court should adjudge for the plaintiff, they found for the plaintiff; if otherwise, for the defendant; and they found the said Elizabeth to be yet alive.

Leary, 162 Mass. 108, 112; *McClanahan v. N & W. Ry. Co.*, 122 Va. 705; *Tichborne v. Weir*, 67 L. T. N. s. 735; *In re Jolly*, [1900] 1 Ch. 292, [1900] 2 Ch. 616; *Nisbet & Potts' Contract*, [1905] 1 Ch. 391, [1906] 1 Ch. 386.

After arguments at the bar in the Common Pleas and at the bench, it was, by the opinion of RICHARDSON, Chief Justice, HURTON, and VERNON, adjudged for the plaintiff, against the opinion of HARVEY, Justice, who argued strongly for the defendant. And hereupon a writ of error was brought; and the error assigned only in the matter of law. And it was divers times very well argued at the bar by *Littleton*, Recorder of London, and *Serjeant Brampton*, for the defendant in the writ of error, and by *Calthrop* and *Serjeant Henden*, for the plaintiff; and afterward by all the Justices of the King's Bench *seriatim*.

And JONES, BERKLEY, and MYSELF held, that the judgment was erroneous. The main question was, Whether by any of these acts there was a disseisin committed to Charles Earl of Nottingham *nolens volens*; and if there be a disseisin, who should be the disseisor and tenant to the freehold? And to the first JONES, BERKLEY, and MYSELF held, that the law will not impute nor construe it to be a disseisin unless at the election of Charles Earl of Nottingham, when as none of the parties intended it to be a disseisin, nor to oust him of the possession; for, as Co. Lit. 153 b, defines, "A disseisin is when one enters, intending to usurp the possession, and to oust another of his freehold;" and therefore *quærendum est a iudice, quo animo hoc fecerit*, why he entered and intruded; and it is at the election of him to whom the wrong is done, if he will allow him to be a disseisor, or himself out of possession; and therefore if one receive my rent, it is at my election if I will charge him with a disseisin, by bringing an assise or other action, or have an account. And if an infant makes a lease for years rendering rent, and the lessee enter, it is at the election of the infant to charge him in assise, or to bring debt for the rent, or to accept the rent at his full age, as 7 Edw. 4, 6, and other books be. So it is if one enters, claiming as guardian in socage, or by nurture, where he is not, it is at the election of the infant to bring an assise, or to charge him as guardian, thereby admitting him to be in without wrong; as 49 Edw. 3, 10; 40 Edw. 3; "Accompt," 35 and 33 Hen. 6, 2, and many other books be. And tenant at will is at the will of both parties; and the will shall not be determined by every act. *Vide* 28 Hen. 8; 62 Kelway; 20 Hen. 7, 65. So where a *feme* lessee at will takes husband, or a *feme* makes a lease at will, and takes husband, although the *feme* hath put her will in her husband, yet it shall not be said a determination without the election of the lessor or husband to the contrary. 38 Hen. 8; Dyer, 62. Lessee surrenders, and yet occupies, he is no disseisor, but at the pleasure of the lessor, 11 Ass. 6, where a man makes a feoffment and continues in possession: and the common case where a copyholder makes a lease for years, not warranted by the custom, yet it is no disseisin; and the law accounts it a good lease betwixt lessor and lessee and all strangers: and to that purpose was cited Hilary, 18 Jac. 1, Rot. 792, *Streat v. Virrall*, *ejectione firmæ* brought upon such a lease;

and upon special verdict adjudged for the plaintiff, that it is a good lease against all but the lord. And they all relied upon another judgment in the point, betwixt *Powsley v. Blackman*, Cro. Jac. 659, where one Carr bargains and sells land, by indenture enrolled, to Bertram, upon condition that upon payment of three hundred pounds at the end of three years it should be void; and that in the interim the bargainee should not meddle with the profits of the land. The bargainor occupies and makes a lease for five years, and at the day doth not pay the money; the bargainee doth not enter, but (the bargainor occupying it) he devised that land: and it was adjudged a good devise; but if he had been disseised, the devise had been void. And here it shall not be intended that the son intended to disseise his father, but that the lease was made by the assent of the father: also the party to whom the lease is made doth not claim any freehold, but to have the lease only, and to pay his rent, and pays the rent accordingly; so there was no intent in any of the parties to make a disseisin, then the law shall not construe it to be a disseisin *partibus invitis*. And hereby it follows, that the freehold remains in the Earl of Nottingham until the fine levied by him and his son; and so the uses well raised, and the jointure well assured.¹

Secondly, admitting there were a disseisin committed by these acts, the question is, Who is disseisor and tenant of the freehold? And JONES, BERKLEY, and MYSELF held, that William Lord Effingham, who made the lease, is the disseisor and tenant; for when tenant at will takes upon him to make a lease for years, which is a greater estate than he may make, that act is a disseisin, and by this lease for

¹ "DISSEISIN BY ELECTION. An assise of novel disseisin was an action for the recovery of the possession of land, introduced probably about 1175. It was considered a speedy remedy. An allegation of a disseisin by which the demandant had been wronged was requisite; but this allegation might be supported by the proof of acts which did not constitute an actual disseisin. Such acts were held to constitute a disseisin only at the election of the demandant and in order that he might avail himself of this speedy remedy. An actual disseisin was the foundation of rights in the disseisor; it operated to the prejudice of the disseisee. A disseisin by election afforded him a convenient remedy through which to enforce his rights.

In *Taylor d. Atkyns v. Horde*, 1 Burr. 60 (1757), A. had been entitled to certain lands for life, remainder to B. in tail, remainder to C. in tail. B. had brought ejectment against A. and recovered (but on what grounds did not appear). B., being in possession, had enfeoffed D. in fee, and D. had thereupon suffered a recovery to the use of B. and his heirs. Did D. by the entry under this tortious feoffment become a disseisor and therefore a good tenant to the *præcipe*? Lord Mansfield was of opinion that such entry was a disseisin only at the election of the persons whose estates would be prejudiced by the recovery. This was, in effect, to hold that acts which, under the older authorities, had amounted to an actual disseisin did so no longer. See Butler's Note to Co. Lit. 330 b, and 4 Kent, Com. 483-490.

By 8 & 9 Vict. c. 106 (1845), it was provided that a feoffment made after a date therein specified should not have any tortious operation." 3 Gray, Cas. on Prop., 2d ed. p. 34.

years made, and the lessee's entering and paying the rent unto him, and he accepting thereof, he is in as lessee, and the lessor is the disseisor, and hath the reversion expectant upon this lease; and this lease betwixt them is an interest derived out of the inheritance gained by this disseisin: for if a lessee for years makes a feoffment, although it be a disseisin to the lessor, yet it is a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee is in the *per*; as 4 Edw. 2, Brev. 403; 19 Edw. 2, Brev. 770; 15 Hen. 3, Brev. 878; F. N. B. 201; 8 Hen. 7. 6, *per fineux temp.* Edw. 1, *Counterplee de Voucher*, 126; and Co. Lit. 367 a. And warranty may be annexed to such an estate, upon which he may vouch, as 50 Edw. 3, 12. And if such lessee for years, or at will, makes a gift in tail, or a lease for life, that creates a good lease or a good gift in tail amongst themselves and all others, besides the first lessor; and as to him they are both disseisors, as it appears by the books 14 Edw. 4, 6; 18 Edw. 3, *Issue*, 36; 7 Edw. 3, *Issue*, 7; 14 Edw. 3, *Feoffments et Fayts*, 67. So it is where a lessee at will makes a lease for years, especially by indenture, it is a good lease between them, and debt lies for the rent; and the lessee shall not avoid it but by an ouster by the first lessor, as 22 Hen. 7, 26, is. And JONES cited *Spark v. Spark*, Cro. Eliz. 676, where lessee at will made a lease for years, and he, being ousted by a stranger, brought an ejectment and recovered; and betwixt *Streat and Virrall*, *ut supra*. And so it was resolved in this court, 28 Eliz. that an *ejectione firmæ* lies upon a lease made by a copyholder not warranted by custom against any stranger; and the Year-Book of 12 Edw. 4, 13, is directly to the point: so here, when lessee for years enters according to the lease and pays his rent, the freehold betwixt them shall be in William Lord Effingham, who made the lease, and not in Humphrys, who is only lessee; and then the fine levied by the Earl of Nottingham and his son conveys well the freehold, and the uses are well raised upon this fine, and the jointure well settled; and then during her life the Earl of Nottingham hath no title to make a lease: wherefore the judgment ought to be reversed; and so much the rather for the great mischief which would ensue, if one who hath a tenant at will, who makes a lease for a small time, and the first lessor, not knowing thereof, levies a fine for a jointure for his wife, or to perform his will, or to other uses, &c. if he should be adjudged disseised, and as a disseisee to levy a fine which should tend to the benefit of the lessee for years, and be adjudged a disseisor against his intent or knowledge, as in this case is pretended, many should lose their inheritances. In many manors are divers tenants at will, where the father is tenant at will, and after him the son enters and occupies at the will of the lord, and is so reputed, and the lord allows them, and never accounted them as disseisors; if such tenants at will make under-leases for a year, or for half a year, if the lords of those manors levy fines of those manors, and this

should tend to the benefit of the under-lessees, who should be reputed to be disseisors without the intent of any of the parties, many lords should hereby be disinherited; whereupon they concluded, that Humphrys the lessee was neither disseisor nor tenant, but only William Lord Effingham, and he is the disseisor and tenant; and the fine levied by Charles Earl of Nottingham, and William Lord Effingham his son, is a good fine, and the uses well raised, whereby Elizabeth the wife of the said William Lord Effingham hath good title, and the defendant under her. Wherefore the judgment ought to be reversed.

BUT RICHARDSON, Chief Justice, argued to the contrary, and continued his former opinion, that Humphrys is the disseisor, and was tenant of the freehold at the time of the fine levied: and then the fine by the Earl of Nottingham (being a disseisee, and his son William Lord Effingham adjutor to the disseisin) shall inure to bar the right of the Earl of Nottingham, and for the benefit of the said Humphrys, according to the opinion in 2 Co. 56, *Buckler's Case*; and that he is a disseisor to the Earl of Nottingham, not at his pleasure, but *de necessario*; for a disseisin is a tortious ousting of any one from his seisin: and here this taking of the lease by Humphrys from Lord Effingham tenant at will, and his entering by color of the said lease, is a disseisin. And here is an entry *usurpando jus alienum* without consent of the Earl of Nottingham: and as tenant at will may not grant his estate, as 27 Hen. 6, pl. 3, is, no more may he make an estate; and the Earl of Nottingham hath no election to say it is no disseisin. But he agreed to the case, where an infant makes a lease for years, reserving rent, and the lessee enters, the infant hath election to allow him to be his tenant, or to be a disseisor, which is most for his advantage: so where one enters and claims as guardian and occupies, the infant may allow him either disseisor or accomp-tant, which shall be for his best advantage.

Secondly, he held, that Humphrys is the sole disseisor and tenant of the freehold; for he, by his entry, did the sole act which made the disseisin: for the lease for years is merely a void contract; and when one enters by color of a void conveyance, he is the disseisor, as in *Crofts v. Howels*, Plow. 530, where a guardian assigned dower to a *feme* who is not dowable, and she enters, by her entry she is a disseiseress, 24 Edw. 3, pl. 43. If one enters by color of a void extent, it is at the peril of him who enters and takes the profits, to see by what right he enters. And he denied that the making of a lease for years, is either an express or implied command to enter or make a disseisin. And he denied that the making of a lease for years had gained the reversion to the lessor; but if lessee for years, or at will, makes a lease for life, or a gift in tail, he, by making livery, transfers the freehold, and gains to himself the inheritance, but by a nude and void contract he cannot gain the reversion. Whereupon he concluded, that Humphrys is the disseisor and tenant,

and that the fine inures to the benefit of Humphrys, and not to the limitation of the uses in the indenture, because none of the parties had anything in the land at the time of the fine levied; and that the judgment ought to be affirmed.

But afterwards, for the reasons of us three, the judgment was reversed.

Note, SIR ROBERT HEATH, Chief Justice of the Common Pleas, CRAWLEY, Justice, BARON DENHAM, and BARON TREVOR, agreed with this judgment in the King's Bench; and conceived, that it would be very mischievous if it should be adjudged otherwise. But SIR HUMPHRY DAVENPORT seemed to doubt whether the lessee for years ought not strictly to be taken for the disseisor and tenant.¹

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BOND v. O'GARA

177 Mass. 139. 1900.

WRIT OF ENTRY, to recover a tract of land situated in Leicester. Plea, general issue. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

The demandant claimed title through a deed to him on the premises by one Lanphear, dated March 11, 1899. Lanphear's title came from a deed dated January 5, 1899, also delivered on the land, to him, by Kate Hanlon and her children, being the children and heirs of her deceased husband, John Hanlon. The tenant claimed title through a lease from the heirs of one Olney, deceased, dated December 9, 1898. The paper title was shown to be in the heirs of Olney by a series of conveyances beginning with the deed of one Burr to Buchanan, June 4, 1863. The demandant claimed that John Hanlon or his widow, Kate Hanlon, or his heirs who signed the deed to Lanphear, had acquired a title to the premises by possession for twenty years.

There was evidence tending to show that John Hanlon entered upon the premises about the year 1864, cut the wood and timber, and thereafter occupied the same for a garden and for pasturing his cow and for other purposes, the evidence tending to show that this occupation was exclusive and continuous. There was evidence tending to show that John Hanlon entered upon the premises either in pursuance of a verbal gift of the land to him by Samuel L. Hodges, or by a permission to occupy the same granted to him by Hodges, who became owner of the premises by a deed from Pat-

¹ In *Mayor and Commonalty of Norwich v. Johnson*, 3 Lev. 35, the court said: "The Claim of the Tortfeasor cannot create a particular Estate, and so apportion his own Wrong, but of Necessity he is a Disseisor in Fee; because there is no particular or other Estate *in esse*."

rick Hanover, dated October 30, 1865, and Hodges conveyed the same to one Gilbert and others on October 19, 1866. John Hanlon died in 1873, and thereupon his widow continued to occupy the premises in the way in which her husband had done, and in the way in which she occupied the adjoining farm, the title to which was in John Hanlon at the time of his death. Some of her children, the heirs of John Hanlon, lived with her and worked on the premises in question. The evidence tended to show that this occupation of John Hanlon during his life and that of Kate Hanlon was open and continuous and exclusive, and the principal question in controversy was whether the occupation was under a claim of right or under a license or permission from Hodges. Kate Hanlon testified, and some of her children testified, and there was evidence tending to show that the occupation was under the claim that Samuel L. Hodges had given the land to John Hanlon, and that Kate claimed to occupy it as her own because Hodges had given it to her husband.

This evidence was controverted by the tenant, who put in evidence that said Kate Hanlon had stated that Hodges had given to her husband and herself the right to occupy the premises and the right to cut the grass, etc. The deeds from Burr to Buchanan, from Buchanan to Hanover, and from Hanover to Hodges, reserved a right to the Leicester Reservoir Company, whose pond bordered on the premises, to take material for its dam from the premises; and there was evidence that an employee of the Leicester Reservoir Company had crossed the premises and had torn down a fence within twenty years, which had been put up by Kate Hanlon, and that thereupon Kate Hanlon had restored the fence. After the employee had torn it down the second time she left an opening where he could go through, and thereafter the fence was left undisturbed.

There was no evidence, except such as may be inferred from the evidence herein stated, that any of the owners of the paper title of the land, except Hodges, had ever given any license or permission, or had any knowledge of any license or permission, to John Hanlon or Kate Hanlon, or the heirs of John Hanlon, to occupy the premises.

The demandant asked the judge to instruct the jury as follows: 1. If the owner of the land verbally gave the land to John Hanlon, and thereupon Hanlon entered on the premises and occupied them continuously till his death, claiming to own them, and was not interfered with in said occupation, and immediately upon his death his widow continued to occupy the same continuously in the same way, and the whole period of such continuous occupation amounted to twenty years, the jury would be authorized to find that the title was in Mrs. Hanlon, or in her and the heirs at law of said John Hanlon, and that the title passed to the demandant by virtue of deeds which were annexed as exhibits A and B. 2. If the occupation of Mrs. Hanlon has been sufficient to give a title, under the rules of

law given you, but for some license or permission which might qualify such occupation, then the said license or permission must appear to be a license or permission granted by the owner before or at the time the occupation is going on, or in force during the time of such occupation. 3. Any license or permission given by Hodges during his ownership is, in itself, of no legal importance, as affecting occupancy by Mrs. Hanlon subsequent to the date when he parted with his title, and it could have no force in this case, unless there is evidence that the grantees of Hodges, while owners, renewed or adopted, or in some way intentionally continued or revived, such license or permission. 4. If the occupation of Mrs. Hanlon of the premises in question for twenty years was such that the real owner of the premises could have sued her for trespass for such occupation, then said occupation was adverse within the meaning of the law. 5. On the evidence in the present case the occupation by Mrs. Hanlon of the premises in question, cultivating the same, cutting the hay and grass on the same, and pasturing her cow thereon, was such occupation as would support an action of trespass on the part of the owner of the estate, in the absence of any license or permission given by the person who owned the premises at the time of said occupation.

The judge refused to give the instructions in the form requested, but after general instructions as to adverse possession instructed the jury, in substance, that if Hanlon's occupancy was not by gift, but by permission only, he did not acquire any right against the owner of the land; that the right of Hodges to continue that permission ceased, as matter of law, with the deed given by him on October 19, 1866; that if Hanlon, wife or children, continued to occupy on the belief that the permission continued, no right could be acquired, but that if the occupancy was on the belief that the land was theirs, and continued twenty years uninterruptedly, being adverse and open, a title would be acquired. He further instructed them that, if the first occupation by the father was adverse and the children continued their occupation, they could add the time of their occupation, if they claimed title, to that of their father, but, if not, then, if the mother's belief was that Hodges had given the land to her husband, her uninterrupted occupation for twenty years, if adverse and open, would give a good title; and that if the occupation by Mrs. Hanlon or the heirs was exclusive, except as to the right reserved to the Leicester Reservoir Company, it was sufficient, because that right was reserved by the deed and exercised thereunder.

The demandant excepted to the refusal to give the instructions prayed for, and to the actual instructions given so far as they differed from the instructions prayed for.

The jury returned a verdict for the tenant; and the demandant alleged exceptions.

HOLMES, C. J. This is a writ of entry. The demandant claims

title under a deed from the widow and heirs of one John Hanlon, setting up a title in them by the running of the statute of limitations. There was evidence that the holding of John Hanlon and his widow and heirs had been under a claim of right adverse to all the world. There was also evidence that their occupancy had been under a license from one Hodges, who owned the land after October, 1865, and conveyed it in October, 1866. The question raised by the demandant's bill of exceptions is whether the fact that the license was ended in 1866 by the conveyance of Hodges necessarily made the occupation by the Hanlons adverse, if they supposed the license still to be in operation and purported to occupy under it, but were in such relations to the land that they would have been liable to an action of trespass, or, better to test the matter, to a writ of entry at the election of the true owner.

The answer is plain. "If a man enter into possession, under a supposition of a lawful limited right, as under a lease, which turns out to be void, . . . if he be a disseisor at all, it is only at the election of the disseisee. . . . If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee." *Ricard v. Williams*, 7 Wheat. 59, 107, 108; *Blunden v. Baugh*, Cro. Car. 302, 303. Stearns, Real Actions, (2d ed.) 6, 17.

It is true, of course, that a man's belief may be immaterial as such. Probably, although the courts have not been unanimous upon the point, he will not be the less a disseisor or be prevented from acquiring a title by lapse of time because his occupation of a strip of land is under the belief that it is embraced in his deed. His claim is not limited by his belief. Or, to put it in another way, the direction of the claim to an object identified by the senses as the thing claimed overrides the inconsistent attempt to direct it also in conformity to the deed, just as a similar identification when a pistol shot is fired or a conveyance is made overrides the inconsistent belief that the person aimed at or the grantee is some one else. *Hathaway v. Evans*, 108 Mass. 267; *Beckman v. Davidson*, 162 Mass. 347, 350. See Sedgwick & Wait, Trial of Title to Land, (2d ed.) § 757. So, knowledge that a man's title is bad will not prevent his getting a good one in twenty years. *Warren v. Bowdran*, 156 Mass. 280, 282.

In the cases supposed the mistaken belief does not interfere with the claim of a fee. But when the belief carries with it a corresponding limitation of claim the statute cannot run, because there is no disseisin except the fictitious one which the owner may be entitled to force upon the occupant for the sake of a remedy. *Hoban v. Cable*, 102 Mich. 206, 213. Liability to a writ of entry and disseisin are not convertible terms in any other sense. It is elementary law that adverse possession which will ripen into a title must be under a claim of right, (*Harvey v. Tyler*, 2 Wall. 328, 349,) or, as it has been thought more accurate to say, "with an intention

to appropriate and hold the same as owner, and to the exclusion, rightfully or wrongfully, of every one else."¹ Sedgwick & Wait, Trial of Title to Land, (2d ed.) § 576. "As Co. Lit. 153 *b* defines, 'a disseisin is when one enters, intending to usurp the possession, and to oust another of his freehold'; and therefore *quærendum est a iudice, quo animo hoc fecerit*, why he entered and intruded." *Blunden v. Baugh*, Cro. Car. 302, 303.

The other matters apparent on the bill of exceptions were sufficiently dealt with by the judge. *Exceptions overruled.*²

DALTON v. FITZGERALD

[1897] 1 Ch. 440. 1897.

THIS³ was an action to establish the plaintiff's title to certain lands. In 1828 John Dalton, owner of these lands in the township

¹ True owner allowed to maintain ejectment or equivalent action although defendant was in possession for the statutory period.

Collins v. Johnson, 57 Ala. 304; *Newton v. L. N. Rd. Co.*, 110 Ala. 474; *Pulaski County v. State*, 42 Ark. 118; *McCracken v. San Francisco*, 16 Cal. 591, 636 (*semble*); *Hanchett v. King*, 4 Day (Conn.) 360; *Gay v. Mitchell*, 35 Ga. 139; *Russell v. Davis*, 38 Conn. 562 (*semble*); *Wright v. Keithler*, 7 Iowa 92; *Donahue v. Lannan*, 70 Iowa 73; *Bell v. Fry*, 5 Dana (Ky.) 341; *Worcester v. Lord*, 56 Me. 265; *Wayzata v. Great Northern Ry. Co.*, 50 Minn. 438; *Johnson v. Prewitt*, 32 Mo. 553; *Burke v. Adams*, 80 Mo. 504; *Colvin v. Republican Land Ass'n.*, 23 Neb. 75; *Doherty v. Matsell*, 119 N. Y. 646; *Flanagan v. Boggess*, 46 Tex. 330; *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137.

² On the extent of the title that must be claimed, see *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 107, 108; *La Crosse v. Cameron*, 80 F. R. 264, 272; *Harden v. Watson*, 104 Ark. 641; 148 S. W. (Ark.) 506; *Iona v. Uu*, 16 Hawaii 432; *Warren County v. Lamkin*, 93 Miss. 123; *De Bernardi v. McElroy*, 110 Mo. 650, 659; *Bedell v. Shaw*, 59 N. Y. 46; *King v. Townshend*, 141 N. Y. 358, 364; *Long Island R. R. Co. v. Mulry*, 212 N. Y. 108; *McLain v. Bird*, 120 N. Y. Supp. 1032, 1034; *Tichborne v. Weir*, 67 L. T. N. s. 735; *O'Conner v. Foley*, [1905] 1 I. R. 1.

In *Maas v. Burdetzke*, 93 Minn. 295, it was held, that if A acquires title from the United States and thereafter B, without knowledge of such fact, enters and occupies the land with recognition of the supposed title of the United States, and with intention to acquire such title, and continues in such occupation for the statutory period, he acquires the title as against A. *Iowa R. R. Land Co. v. Blumer*, 206, U. S. 482; *Boe v. Arnold*, 54 Oreg. 52 (overruling *Altschul v. O'Neill*, 35 Oreg. 202; and *Altschul v. Clark*, 39 Oreg. 315); *Spath v. Sales*, 70 Oreg. 269 accord. And see *Hayes v. Martin*, 45 Cal. 559; *McManus v. O'Sullivan*, 48 Cal. 7; *Portis v. Hill*, 14 Tex. 69; *Smith v. Jones*, 103 Tex. 632.

Contra. Hunnewell v. Burchett, 152 Mo. 611, (cf. *Houghton v. Pierce*, 203 Mo. 723; *Mather v. Walsh*, 107 Mo. 121); *McNaught-Collins Imp. Co. v. May*, 52 Wash. 632. And see *Doe v. Beck*, 108 Ala. 71; *Skansi v. Novack*, 84 Wash. 39.

³ The following statement of facts is substituted for that in the report. Ed.

of Bulk, devised other lands to trustees upon trust to settle in a certain manner. John Dalton died in 1837 leaving two daughters as co-heiresses to whom the Bulk estate descended. By deed of July 30, 1842, the trustees settled the property devised to them upon trust in accordance with the will, but through error included the Bulk estate. The testator's daughters were parties to the deed and executed it, but neither purported to grant the property therein and the married daughter did not acknowledge the instrument. The limitations were, in part, to the daughters for life, remainder to James Fitzgerald for life, remainder to Gerald Fitzgerald for life, remainder to the plaintiff for life, remainders over.

The daughters and James died, and thereupon in 1867 Gerald Fitzgerald entered into possession of the estates comprised in the settlement. On succeeding to the estates he passed a succession duty account, which was rendered as an account on the succession of real estate under the will of John Dalton and a settlement in pursuance thereof, and included the lands in Bulk. In 1868 by an indenture, reciting the settlement of 1842, he charged the estates including those in Bulk with a jointure for his widow and portions for her younger children in exercise of powers conferred by the instruments of 1842. In January, 1894, however, he procured himself to be registered in the land registry as proprietor of the fee simple of the lands in Bulk, and devised them to the defendants. He died in February, 1894, without issue. The defendants then entered, and the present action was brought to establish the title of the plaintiff as tenant for life under the settlement.

STIRLING J. For the purpose of the present judgment I assume in favour of the defendants that on the true construction of the will and codicils of John Dalton, the father, the lands and hereditaments in Bulk, to which I shall hereafter refer as the land in Bulk, which are now claimed by the defendants, did not pass by his will and codicils, but on the death of the testator devolved to his co-heiresses-at-law. By the deed of July 30, 1842, to which those co-heiresses were parties, the trustees of the will with their privity purported to bargain, sell, or release these lands in Bulk by a sufficient description to legal uses in favour of the same persons as would have been entitled to have legal uses created in their favour if these lands in Bulk had passed by the will and codicils of John Dalton. Now of this deed Sir Gerald Fitzgerald took the benefit in respect of these very lands in Bulk. This appears to me to be established, first, by the succession duty account passed by him, and, secondly, by the jointure deed executed by him, and dated September 9, 1868. [His Lordship referred to those documents, and continued:—]

Upon this evidence I come to the conclusion of fact that Sir Gerald Fitzgerald entered into possession of the lands in Bulk under the settlement of 1842. The question is whether, having so done, he is not estopped from denying the validity of that deed.

"Bulk"
to daughters.

Similar questions have repeatedly arisen under wills. Those cases appear to divide themselves into two classes. The first is, where a testator having either no title or an imperfect title to land devises it by specific description to or upon trust for a person for life with remainders over. Examples of this class are to be found in *Hawksbee v. Hawksbee*, 11 Hare, 230, and *Board v. Board*, L. R. 9 Q. B. 48. I refer particularly to the latter case, as the judgment is more elaborate and expresses the grounds of decision more fully than in *Hawksbee v. Hawksbee*, 11 Hare, 230. In *Board v. Board*, L. R. 9 Q. B. 48 the testator was simply tenant by the curtesy of certain premises. He devised them to trustees for his daughter Rebecca for life, with remainder to his grandson William. Then, upon the testator's death, Rebecca entered into possession of the property, and paid the annuities charged upon the land, and was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. Then William conveyed his remainder to the plaintiff. Rebecca, after she had been in possession more than twenty years, conveyed the premises in fee to the defendant, who, upon his [her] death, took possession. The plaintiff, the assignee of William, the remainderman, having brought ejectment, it was held that, Rebecca having entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the validity of the will, and that the plaintiff was entitled to recover. In giving judgment Blackburn J. says, L. R. 9. Q. B. 53: "The case is like that of a tenant coming in under a landlord: he is estopped from denying his landlord's title. As to the point that Robert, being only a tenant by the curtesy, had nothing to devise, it may be said that in many instances the landlord has only an equitable title, and yet the tenant is estopped from disputing such title. I think if the law were otherwise the consequences would be disastrous, for how unjust it would be if a person who comes in under a will as tenant for life, and continues in possession until twenty years have elapsed, could say there was a latent defect in the title of his predecessor, and the estate devised really belonged to the heir-at-law, and his title being barred, he, the tenant for life, is entitled to the property in fee simple. It is contrary to the law of estoppel that he who has obtained possession under and in furtherance of the title of a deviser should say that such title is defective. My brother Martin, in *Anstee v. Nelms*, 1 H. & N. 232; 26 L. J. (Ex.) 8 says that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful, so as to give his heir a right against a remainderman. That seems directly in point. It is good sense and good law. All we have to decide here is that Rebecca, having entered under the will, William, the remainderman under the same will, has a right to say that she and all those claiming through her are estopped from denying that the will was valid." Mellor J. says: "A person cannot say that a

will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will." Quain J. says: "I decide this case on the simple point that a person who takes under a will, and acts on the will in paying the legacies and annuities given under it, cannot afterwards turn around and place himself in a different position, and maintain that he is in a position adversely to those who take under the same will."

No doubt has ever been thrown upon that class of cases; but there is a second class as to which there is a conflict of opinion, namely, where a testator, having a good title to property, has not effectually devised it, and the tenant for life of the property effectually devised by the will has entered, just as if it had been included in a valid devise, and acquired by possession a title against the heir. The case which has most frequently happened is under the law as it stood prior to the Wills Act, when a testator was incompetent to devise land acquired subsequently to his will. Of this class of cases *Paine v. Jones*, L. R. 18 Eq. 320, is a leading example. There a testator by his will, dated in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value. It was held, upon a bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed. Malins, V.-C., who decided the case, goes through all the prior cases, including *Board v. Board*, L. R. 9 Q. B. 48, and *Hawksbee v. Hawksbee*, 11 Hare, 230, and he expresses his concurrence with those cases, but he distinguishes them. Referring to them, he says, L. R. 18 Eq. 328: "All these cases proceed on the principle that if parties have no other title than the will, they are estopped from denying the title of persons under the same will. Under this will the widow had no title whatever. The defendants had a title under the will." That is apparently a misprint for "widow." The Vice-Chancellor then goes on: "I think this is a distinct case of adverse possession, and the defendants claiming under the widow have acquired a title as against those persons whose title is only under the will." In a subsequent case of *In re Stringer's Estate*, 6 Ch. D. 1, Sir George Jessel held that if a testator made an invalid devise of property, to which he himself had a good title, to A. for life with remainders over, and

A. acquired a good title by possession against the heir-at-law, A. was not estopped from saying, as against the remainderman, that the devise was invalid. Upon appeal the devise which the late Master of the Rolls had held to be invalid was held to be valid, and no opinion was expressed on the decision of the Master of the Rolls on the point in question; but it appears to me that when his judgment is examined the Master of the Rolls did not intend to throw any doubt upon the class of cases of which *Board v. Board*, L. R. 9 Q. B. 48, is an example. At page 10 of the report he says: "A man is in possession of land with a defective title, but he has possession. In fact, under the old law, he could not have devised without, except in the case of certain reversions. He devises to a man for life with remainder over. The devisee, having no title except under the will, enters under the will. It has been held that he cannot deny that the testator had a right to devise in the way he has devised; that is, that the testator had a sufficient title to support the devise as far as the devisee is concerned — not to make the devises valid which were invalid, because the devises were invalid per se if the testator had insufficient title. Therefore the whole of the estoppel is this: you have entered under the will of a man who had possession as far as you are concerned: possession is the fee: you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee, though you may have found out afterwards that he was only tenant for years, or tenant from year to year, or tenant for life, or anything else. You have got possession under that will, and possession in law, as far as you are concerned, of the fee. All that I understand. That is a little extension of the doctrine of estoppel by contract, but it follows on the same principle." On the other hand, in *Anstee v. Nelms*, 1 H. & N. 230, 232, Pollock C. B. and Martin B. appear to have been of opinion that the principle laid down in *Board v. Board*, L. R. 9 Q. B. 48, was applicable to a case similar to that of *Paine v. Jones*, L. R. 18 Eq. 320, and in the case of *Kenraghan v. M'Nally*, 12 Ir. Ch. Rep. 89, the Lord Chancellor and the Court of Appeal in Ireland appear to have given a decision which was not in accordance with that of Malins V.-C.

It is contended that the present case is governed by the decisions in *Paine v. Jones*, L. R. 18 Eq. 320, and *In re Stringer's Estate*, 6 Ch. D. 1. In my judgment that is not so. The question is not whether Sir Gerald Fitzgerald is estopped from denying that John Dalton devised the lands in Bulk, but whether he is estopped from denying the validity of the settlement of July 30, 1842. It appears to me that the reasoning in *Board v. Board*, L. R. 9 Q. B. 48, applies with as much force to a deed as to a will, and I see no reason why, if a grantor who has no title or an imperfect title to a particular piece of land purports to grant it by deed to A. for life with remainders over, and A. enters under the deed and acquires a good title

against the true owner, he should not be held to be estopped as against those in remainder from disputing the validity of the deed. It is to be observed that in this case the true owners were parties to and executed the deed, and though they did not grant, or purport to grant, the lands in Bulk, still they, by executing the deed, assented to the act of the trustees, and shewed that they treated the deed as a proper settlement in pursuance of the directions in the testator's will. It was said, however, that there could be no estoppel, as the truth appeared on the face of the settlement of July 30, 1842. But, in my judgment, it does not appear on the face of that deed either that the manor of Bulk was only a reputed manor, so that the lands in Bulk belonging to the testator did not pass under a devise of that manor, or that upon the true construction of the testator's will there was an intestacy as regards the lands in Bulk. It is also urged that the settlement of July 30, 1842, was only machinery for giving effect to the dispositions made by the testator, and gave no further or better title than the will itself. This seems to me to give too little weight to the deed, which confers a legal title on the beneficiaries under the will, and defines many rights conferred upon them by the will and codicils (as, for example, that of creating jointures and charging portions for younger children), of which the beneficiaries have availed themselves. The conclusion, therefore, to which I come is that the doctrine of estoppel applies to this case, and that the defendants are precluded from denying that the deed of 1842 was an effectual settlement, and consequently that the plaintiff is entitled to judgment.¹

DOE d. GRAVES v. WELLS

10 A. & E. 427. 1839.

EJECTMENT [against Wells and Trowbridge] for lands in Wiltshire. The several demises were alleged in the declaration to have been made on 17th October, 1836, *habendum* for seven years, from 15th October, 1836. After pleas pleaded, Wells compromised with the lessors of the plaintiff, but Trowbridge continued to defend. On the trial before *Patteson*, J., at the Wiltshire Summer Assizes, 1837, it was proved, on the part of the plaintiff, that Graves, the lessor of

¹ Affirmed. [1897] 2 Ch. 86. See *Reynolds v. Trawick*, 78 So. (Ala.) 827; *Wright v. Stice*, 173 Ill. 571; *Roberts v. Cox*, 259 Ill. 232; *Hanson v. Johnson*, 62 Md. 25; *Haynes v. Boardman*, 119 Mass. 414; *Charles v. Pickens*, 214 Mo. 212; *Brittain v. Daniels*, 94 N. C. 781; *Anderson v. Rhodus*, 12 Rich. Eq. (S. C.) 104, 109; *Stevens v. Bomar*, 9 Humph. (Tenn.) 546; *Brown v. Brown*, 14 Lea (Tenn.) 253; *Austin v. Rutland R. R. Co.*, 45 Vt. 215, 236; *Molony v. Molony*, [1894] 2 I. L. R. 1, 6; *Estate of Tennent*, [1913] 1 I. R. 280; *Smith v. Smith*, 5 Ont. Rep. 690; *Connors v. Myatt*, 24 Dom. L. Rep. 537; *In re Anderson*, [1905] 2 Ch. 70; English cases cited in *Dalton v. Fitzgerald*; Professor H. W. Ballantine, 28 Yale L. J. 224-235.

the plaintiff, was entitled to the reversion upon a lease under which Trowbridge held, which lease was for ninety-nine years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved that, on 17th October, 1836, Graves's agent, in a conversation with Trowbridge, who was then in possession, demanded the rent of him, but Trowbridge then refused to pay it, and asserted that the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer, working a forfeiture of Trowbridge's term; the defendant's counsel disputed this, and contended further that, even supposing this to be a forfeiture, the demise was laid too early, being on the very day of the supposed forfeiture. The learned judge directed the jury to find for the plaintiff, if they were of opinion that the words used by Trowbridge were not mere idle language, but a serious claim of the fee. ~~The jury having found for the plaintiff,~~ the learned judge reserved leave to the defendant's counsel to move to enter a verdict for the defendant. In Michaelmas Term, 1837, *Crowder* obtained a rule accordingly.

LORD DENMAN, C. J. I think *Doe dem. Ellerbrock v. Flynn*, 1 Cr. M. & R. 137; s. c. 4 Tyrwh. 619, is distinguishable from the present case. There it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went farther than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the nature of the tenancy has been sometimes lost sight of, and the words "forfeiture" and "disclaimer" have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited. But no case, I think, goes so far as the present and I feel the danger of allowing an interest in law to be put an end to by mere words.

LITTLEDALE, J. We should not, indeed, be justified in putting an end to a state of law on account of its danger; for we must give parties whatever the law entitles them to: but here the law leads to no such consequence. The case is not like that of a tenancy from year to year, which last only as long as the parties please, and where what has been called a disclaimer is evidence of the cessation of the will. Here property is claimed on the ground of forfeiture. Now, assume the jury to have been right in their verdict: still the facts do not go far enough for a forfeiture. In Comyns's Digest, tit. Forfeiture, and in Viner's Abridgment, tit. Estate (see 10 Vin. Abr. 370, sqq. Forfeiture (C. b), &c.), a very great number of instances of forfeiture are given: but there is no allusion to any case of this kind; the instances are either of matters of record, or of acts *in pais* quite

different from what is here insisted upon. In an *Anonymous Case* in Godbolt, 105, pl. 124, the tenant claimed the fee on the record, in an action of debt; and yet it was held to be no forfeiture. *Doe dem. Ellerbrock v. Flynn* has been satisfactorily distinguished by My Lord.

PATTESON, J. No case has been cited where a lease for a definite term has been forfeited by mere words. We know that mere words cannot work a disseisin, although some acts have been held to work a disseisin at the election of the party disseised, which, as against him, would not work a disseisin. An attornment again is an act. Here there is no act; and, if we held that there was a forfeiture, we should be going much beyond any previous decision. It is sometimes said that a tenancy from year to year is forfeited by disclaimer: but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy.

WILLIAMS, J., concurred.

*Rule absolute.*¹

¹ *DeLancey v. Ganong*, 9 N. Y. 9, accord.

"Till within a comparatively recent period, it was considered that a tenant could not in any sense, repudiate his tenancy, even where it existed by parol merely, or from year to year; or that he could not do this without surrendering or abandoning the premises. But it is now settled otherwise in this State, and in the United States Supreme Court. The tenant, by distinct notice to his landlord that he will no longer hold the premises under him, has been regarded here as committing an absolute disseisin, and after that, as holding adverse to the landlord, and unless evicted before the term of the Statute of Limitations expires, he will, by such adverse possession, acquire title in his own right. In *Willison v. Watkins*, 3 Peters U. S. 48, Mr. Justice Baldwin says: 'Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will, from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them.' This case was professedly followed in two cases in this State: *Greeno v. Munson*, 9 Vt. 37; *Hall v. Dewey*, 10 Vt. 593; and has been recognized in many others. It is undoubtedly a new doctrine, and adopted here from a regard to the difference in our land tenures, and in our civil and social relations and institutions in many respects, from those in England." Per REDFIELD, C. J., in *Sherman v. Champlain Transportation Co.*, 31 Vt. 162, 177. See 2 Taylor, Landl. and Ten., 9th ed., § 522; 2 Tiffany, Landl. and Ten., § 192.

The landlord must have notice. *Bedlow v. N. Y. Dry Dock Co.*, 112 N. Y. 263. But compare *Illinois Steel Co. v. Budzisz*, 139 Wis. 281.

On the adverse possession of land encroached on by a tenant for years, see *Wilhelm v. Herron*, 178 N. W. (Mich.) 769; *Pharis v. Jones*, 122 Mo. 125; *Dempsey v. Kipp*, 61 N. Y. 462, 470; *Read v. Allen*, 63 Tex. 154; *Doe d. Lloyd v. Jones*, 15 M. & W. 580; *Andrews v. Hailes*, 2 E. & B. 349; *Doe d. Croft v. Tidbury*, 14 C. B. 304; *Kingsmill v. Millard*, 11 Exch. 313; *Tabor v. Godfrey*, 64 L. J. Q. B. 245; 18 Halsbury, Laws of England, §§ 1079-1081.

MIXTER v. WOODCOCK

154 Mass. 535. 1891.

WRIT OF ENTRY, dated December 7, 1886, to recover a parcel of land on Fruit Street in Worcester. After the former decision, reported in 147 Mass. 613, the action at law was changed in the Superior Court to a suit in equity. At the hearing, before *Blodgett, J.*, it appeared in evidence that John E. Luther, who died in June, 1856, leaving a widow but no issue, was seised in fee of the parcel in question; that by his will his widow, under the former decision, took a life estate only in the premises, but remained in possession from the death of the testator until her death in 1886, believing that she took an estate in fee under the will; and that she occupied them openly in all respects as her own, claiming title in fee thereto. On three several occasions, in 1862, 1876, and 1885, she gave mortgages thereof in the usual form, all of which were recorded, and all but the last of which were discharged. The plaintiff, who was the demandant in the writ of entry, was the mortgagee named in the last of these mortgages, and believed that the widow had a title in fee at the time he took his mortgage. The condition of the mortgage having been broken, he duly foreclosed, under a power of sale contained therein, and a conveyance was afterwards made to him. In August, 1886, he entered upon the premises for the purposes of foreclosure, but never had any other possession thereof. The defendant, who was a tenant in the writ of entry, made no claim of title, but was in possession at the time the writ of entry was brought, and continued in possession of the demanded premises at the time of the hearing.

The judge ruled that, as matter of law, it having been decided that the widow of John E. Luther took a life estate only under the will, she could not acquire a title in fee to the premises by adverse possession, and that the plaintiff took no title by his mortgage and its foreclosure which would enable him to maintain this suit in equity, or an action at law, against the defendant for the recovery of the land and dismissed the bill, and reported the case for the determination of this court.

MORTON, J. Without undertaking to say that in no case could the occupation of a life tenant be so long continued and of such a character as to vest in him a title in fee by adverse possession, and without intending to intimate that it could, we think that the ruling of the judge who heard this case was correct. Under the decision in the case of *Mixter v. Woodcock*, 147 Mass. 613, the only estate which the widow had was a life tenancy. She was in possession of the premises as a life tenant. Her belief that she owned the property absolutely did not give her any additional rights, nor did the like belief on the plaintiff's part help matters. That simply made the mistake a common one. The widow was not in possession under

a deed or instrument which purported to give her a fee, but in fact only gave her a life estate, and which might have afforded some color for her belief that she owned the fee and for her acts; she was in possession under the will of her husband, which did not purport to give, and did not in fact give, her anything except a life estate. If the mortgages executed by her may be regarded as acts of dis-seisin, so that the reversioner could have entered, he was not obliged to do so, but could wait until his right of entry accrued upon her death; and neither the widow nor those who claim under her would acquire any rights against him, or title to the property, by virtue of her or their occupation in the mean time. *Wells v. Prince*, 9 Mass. 508; *Wallingford v. Hearl*, 15 Mass. 471; *Tilson v. Thompson*, 10 Pick. 359; *Miller v. Ewing*, 6 Cush. 34. The demandant must recover on the strength of his own title. Failing to show title, he must at least show a better right to possession than the tenant. This he does not do.

The decree dismissing the bill must therefore be *Affirmed*.¹

¹ See *Pooler v. Hyne*, 213 F. R. 154; *Mettler v. Miller*, 129 Ill. 630, 642; *Maring v. Meeker*, 263 Ill. 136; *Keith v. Keith*, 80 Mo. 125; *Anderson v. Miller*, 103 Neb. 549.

Adverse Possession against reversioners and remaindermen.

Where there is a reversion or the remainder is vested. *Gregg v. Tesson*, 1 Black (U. S.) 150; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; *Sloss-Sheffield Co. v. Yancey*, 202 Ala. 458; *Franke v. Berkner*, 67 Ga. 264; *Higgins v. Crosby*, 40 Ill. 260; *Kibbie v. Williams*, 58 Ill. 30; *Castner v. Wolrod*, 83 Ill. 171; *Field v. Peoples*, 180 Ill. 376; *Cassem v. Prindle*, 258 Ill. 11; *Allison v. White*, 285 Ill. 311; *Gibbs v. Gerdes*, 291 Ill. 490; *Murray v. Quigley*, 119 Iowa, 6; *Nevelier v. Foster*, 186 Iowa 1307; *Bates v. Adams*, 182 Ky. 100; *May v. Chesapeake & O. Ry. Co.*, 184 Ky. 493; *McCoy v. Poor*, 56 Md. 197; *Wells v. Prince*, 9 Mass. 508; *Wallingford v. Hearl*, 15 Mass. 471; *Stevens v. Winship*, 1 Pick. (Mass.) 317; *Tilson v. Thompson*, 10 Pick. (Mass.) 359; *Whitaker v. Whitaker*, 157 Mo. 342; *Bohrer v. Davis*, 94 Neb. 367; *Criswell v. Criswell*, 101 Neb. 349; *Foster v. Marshall*, 22 N. H. 491; *Jackson v. Mancius*, 2 Wend. (N. Y.) 357; *Baker v. Oakwood*, 123 N. Y. 16; *Thompson's Heirs v. Green*, 4 Ohio St. 216; *Moore v. Luce*, 29 Pa. 260; *Jeffcoat v. Wingard*, 110 S. C. 482; *Central Land Co. v. Laidley*, 32 W. Va. 134.

Where the remainder is contingent. *Graft v. Rankin*, 250 Fed. 150; *Brian v. Melton*, 125 Ill. 647; *Miller v. Pence*, 132 Ill. 149; *McFall v. Kirkpatrick*, 236 Ill. 281; *Hill v. Hill*, 264 Ill. 219; *Fearne*, C. Rem. 287.

See *Lewis v. Barnhart*, 145 U. S. 56; *Dugan v. Follett*, 100 Ill. 581; *Lewis v. Pleasants*, 143 Ill. 271; *Weigel v. Green*, 218 Ill. 227; *Kales*, 14 Ill. L. Rev. 124; *Kales*, Estates and Future Interests, 2d ed., §§ 383-397.

Adverse Possession as a bar to dower. *Williams v. Williams*, 89 Ky. 381; *Putney v. Vinton*, 145 Mich. 219, 9 Ann. Cas. 149 note; *Winters v. De Turk*, 133 Pa. 359. Curtesy. *Shortall v. Hinkley*, 31 Ill. 219; *Calvert v. Murphy*, 73 W. Va. 731, 52 L. R. A. N. s. 535 note.

DOE d. SOUTER v. HULL ET AL.

2 Dowl. & R. 38. 1822.

EJECTMENT [on the several demises of John Souter and George Chatfield and Elizabeth his wife] to recover the possession of certain freehold lands and premises situate at Midhurst, in Sussex. At the trial before *Park, J.*, at the last assizes for the County of Sussex, the case was this: Henry Souter, the father of the lessor of the plaintiff John Souter, being seised in fee of the premises in question, made his will, bearing date the 12th of June, 1788, by which he gave the same to his wife in these words, "I give to my loving wife Mary Souter all my household goods and chattels, and I give to her a barn and piece of free land at Midhurst, in Sussex." On the 7th of October, 1790, the testator died seised, leaving John Souter, who claimed to be his eldest son and heir-at-law, and his said wife, him surviving. On the 9th of October, 1794, the widow and John Souter jointly conveyed the premises to Christopher Hull, the father of the defendants, by deed of bargain and sale, who took possession and remained undisturbed therein till July, 1814, when he died, leaving his will, whereby he demised the premises to the defendants, in equal moieties. Whicher Souter was, in fact, the eldest son and heir-at-law of the testator Henry Souter, whom he survived, but he did not join in the conveyance to Mr. Hull. On the 6th of November, 1810, Whicher Souter made his will, by which he bequeathed all his real estate to his wife Elizabeth Souter, and his brother John Souter (the party who joined in the conveyance to Mr. Hull), upon trust to make an inventory thereof, and first, by sale of part, to pay his debts, &c., the residue to his wife for life, or while she continued his widow, and upon her death, or marriage, to his children, share and share alike. Whicher Souter died shortly after making this will, and in 1803 his widow married the lessor of the plaintiff, George Chatfield. Upon this case it was contended, that the lessors of the plaintiff were entitled to recover the premises, as devisees in trust under the will of Whicher Souter, the heir-at-law of Henry Souter, the original testator, and that the defendants must resort to their action against John Souter, the party to the conveyance to Mr. Hull, upon the deed. For the defendants three objections were taken. First, that as Whicher Souter was not in possession when he made his will, he could not devise a right of entry; second, that the realty did not pass under his will, the language of it being clearly referable to personal property only; and third, that as Mr. Hull had maintained an adverse possession for twenty-two years, and had died so adversely possessed, and had bequeathed the estate to his children, a descent was cast. The learned judge, however, was of opinion that the lessors of the plaintiff had shown a good title, and directed the jury to find a verdict for the plaintiff, reserving the

points of law raised for the defendants, with liberty to them to move to enter a nonsuit, if the court should be of opinion that the objections were well founded.

ABBOTT, C. J. I am of opinion that there is no foundation for either of the objections presented for our consideration. With respect to the first, I think there is no ground for saying, that the adverse possession of Mr. Hull has operated as a disseisin of Whicher Souter. Mr. Hull did not take possession wrongfully, he only wrongfully continued possession. He came in under right and title, which remained good during the life estate of Henry Souter's widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance to Whicher Souter, who permitted him for a period to remain in possession. It has been held in a recent case in this court, that a mortgagor in actual possession of mortgaged premises is tenant by sufferance to the mortgagee, and this is a still stronger case than that. I know of no authority which says, that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment. Then, as to the second objection, I am decidedly of opinion, that no descent has been cast in this case. To allow the argument on this point would be to allow, that wherever a wrongful possessor dies in possession, and his heir enters, the real heir-at-law cannot support ejectment. That would be a monstrous proposition generally, but especially in this case, where the heir-at-law was never disseised, and the defendants in the action were never seised at all. The language of "descent cast" imports that the ancestor is seised and the question is begged, if it is assumed that in this case Hull, the ancestor of the defendants, was seised.

BAYLEY, J. I am of the same opinion. In order to bar the power of devising a right of entry, there must be an actual disseisin of the devisor a mere adverse possession will not suffice; he must be completely ousted of the freehold. The question, then, is whether Whicher Souter, the devisor under whose will the lessors of the plaintiff claim, was ever divested of the freehold; and I am of opinion that he never was. The relation of Mr. Hull to Whicher Souter is that of landlord and tenant; the former was tenant by sufferance to the latter from the moment of Mrs. Souter's decease. This point was laid down in this court in the recent case cited by My Lord, and is founded upon the doctrine in Lord Coke. Co. Lit. 240 b. The lessors of the plaintiff have shown a clear title in Whicher Souter, and if he had an estate in the premises, he was competent to devise it; he does devise it, and it vests in the lessors of the plaintiff as devisees in trust under his will. To support a descent cast, it must be shown that the ancestor was seised. Here, there was no seisin of

Mr. Hull, the ancestor. In a case which I remember came from Warwick some time since, the counsel relied upon a descent cast. It appeared in evidence that the party originally came into possession rightfully, and his possession was lawful, until a particular person died. After the death of that person, the party held over, and levied a fine, and when he died an ejectment was brought against his heir. On behalf of the heir it was insisted, that there had been a descent cast. No, said the court; for upon the death of the particular person alluded to, the ancestor became tenant by sufferance only; and therefore there could not be a descent cast, because there was no seisin. The definition which Lord Coke gives of a tenant by sufferance, is he who originally comes in by right, but continues in possession by wrong. Now, that is exactly the description of Mr. Hull, under whom the defendants claim, and therefore I think the lessors of the plaintiff are entitled to recover. It is said, that there has been an adverse possession for twenty-two years in this case. I know of no case in which it has been held, that a mere adverse possession (if this case is so put), can operate as a disseisin, to prevent the owner of the freehold from devising it by will. Mr. Hull was only a disseisor in one way, namely, at the election of Whicher Souter. There are many authorities which say, that this would only be a disseisin at the election of the owner of the freehold of inheritance; and if Whicher Souter had thought fit to treat it as a disseisin, he would be warranted in doing so; but he was not bound to do so. *Doe d. Atkyns v. Horde*, Cowp. 689. On these grounds, I am of opinion that the lessors of the plaintiff are entitled to recover.

HOLDROYD, J., and BEST, J., concurred.

*Rule refused.*¹

DOE d. PARKER v. GREGORY

2 A. & E. 14. 1834.

EJECTMENT for lands in Gloucestershire. On the trial before *Alderson*, B., at the last Gloucester Summer Assizes, the following facts were proved. Thomas Rogers, being seised in fee of the lands in question, devised them to his son Thomas Rogers for life, remainder to William Rogers in tail male, remainder to the devisor's right heirs in fee. The will gave a power to the tenant for life to settle a certain portion of the lands upon his wife for life, by way of jointure. After the death of the devisor, the son Thomas Rogers, being then tenant for life, settled the lands in question, being not more than the portion defined, upon his wife for life. He died in 1798, leaving his wife surviving, who afterwards married a person of the name of Vale. In 1810, Mr. and Mrs. Vale levied a fine of the lands to their own use in fee. In 1812, Mrs. Vale died, more

¹ See *Smith d. Teller v. Burtis*, 6 Johns. (N. Y.) 197.

than twenty years before the commencement of this action. Mr. and Mrs. Vale had continued in possession of the lands until Mrs. Vale's death, and Mr. Vale from thenceforward continued in possession till his own death, which occurred in 1832. William Rogers died, leaving several children, all of whom died before Mrs. Vale; and of whom none left issue, except one daughter, who died one month before Mrs. Vale, leaving issue a son, who died without issue in 1814, within twenty years of the bringing of the action. The lessor of the plaintiff was heir at law to the devisor, Thomas Rogers. It did not appear how the defendant got into possession. On these facts, the learned judge nonsuited the plaintiff, on the ground that the right of entry was barred by the Statute of Limitations, but he reserved leave to move to set the nonsuit aside, and enter a verdict for the plaintiff.

PER CURIAM (LORD DENMAN, C. J., TAUNTON, PATTESON, and WILLIAMS, JJ.) The fine will make no difference;¹ but, as to the question of the husband's adverse possession, we will take time to consider.

On a subsequent day LORD DENMAN, C. J., delivered the judgment of the court.

The other points moved by my Brother Talfourd were disposed of by the court, but we wished to consider whether he was entitled to a rule on the ground that there had been no adverse possession for twenty years. The fact was, that the defendant had been in possession for a longer period, from his wife's death, but he came in originally in her right, and had not directly ousted the rightful owner, but merely continued where he was, to his exclusion. A case of *Reading v. Rawsterne*, reported by Lord Raymond and Salkeld, 2 Ld. Raym. 830 s. c. 2 Salk. 423, was mentioned but in that case, though an actual disseisin is declared necessary, those words must be taken with reference to the subject-matter, and are there contra-distinguished from the mere perception of rents and profits, in the case of joint-tenants. But in *Doe dem. Burrell v. Perkins*, 3 M. & S. 271, the court was of opinion that a fine levied by a person who was in possession under the same circumstances as the defendant here, operated nothing, because he came in by title, and had no freehold by disseisin; and it was argued, that the defendant here was also to be considered as having entered rightfully, and committed no disseisin. We are, however, of opinion, that though this may be so for the purpose of avoiding a fine, it cannot prevent the defendant's possession from being wrongful, from the very hour when his interest expired by his wife's death. It is clear that he might have been immediately turned out by ejectment. We think, therefore, that his continuing the same possession for twenty years entitles him to the protection of the Statute of Limitations, and that this action has been brought too late.

*Rule refused.*²

¹ Stat. 11 Hen. VII, c. 20; Stat. 32 Hen. VIII, c. 36, § 2.

² 2 Smith, L. C., 11th ed., 652-655.

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SUMNER v. STEVENS

6 Met. (Mass.) 337. 1843.

WRIT OF ENTRY. The demandant claimed title to the demanded premises under a deed of warranty from Stephen Stevens, her father, who was also father of the tenant. At the trial, before *Wilde, J.*, the tenant rested his defence upon a title by disseisin of said Stephen, and offered evidence tending to show, that more than 20 years before the date of the demandant's writ, and before said Stephen's deed to the demandant, said Stephen made a gift to him, by parol, of the demanded premises, and that he afterwards went into possession thereof, and continued in exclusive possession upwards of 20 years.

Upon this evidence, the jury were instructed, that if they believed it, and also believed that the tenant entered and continued his possession, *claiming title*, this would constitute a title by disseisin, and that they should return a verdict for the tenant. The jury found a verdict for the tenant, which is to be set aside, if the foregoing instruction was incorrect.

SHAW, C. J. The case shows that the tenant entered, more than twenty years before the commencement of this action, under a parol gift from his father, and has had the sole and exclusive possession ever since. Had the tenant simply shown an adverse and exclusive possession twenty years, he would have shown that the owner had no right of entry, and that would have been a good defence to this action. Is it less so, that the tenant entered under color of title? A grant, sale or gift of land by parol is void by the Statute. But when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner, and not as tenant; and it equally proves an admission on the part of the donor, that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the Statute, but which the parties, by mistake, believe good. The possession of such grantee or donee cannot, in strictness, be said to be held in subordination to the title of the legal owner; but the possession is taken by the donee, as owner, and because he claims to be owner; and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession; but until he does this, by entry or action, the possession is adverse. Such adverse possession, continued twenty years, takes away the owner's right of entry. *Barker v. Salmon*, 2 Met. 32; *Parker v. Proprietors of Locks and Canals*, 3 Met. 91; *Brown v. King*, 5 Met. 173; *Clapp v. Bromagham*, 9 Cow. 530. We have not used the term "disseised," because the accurate definition and description of disseisin has been the subject of much discussion. The term is somewhat

equivocal, and the same facts may prove a disseisin, for some purposes and in some aspects, and not in others. It is enough for the decision of this case, that the tenant had the actual, exclusive and adverse possession of the estate more than twenty years, by which the owner, and all persons claiming under him, were barred of their entry and right of action. Rev. Sts. c. 119, § 1.

*Judgment on the verdict.*¹

GRUBE v. WELLS

34 Iowa, 148. 1871.

APPEAL from Des Moines District Court.

Action to recover the possession of a part of lot 260, in the northern addition to the city of Burlington, being a strip of about the width of fifteen feet, of the south end of said lot. Trial to the court without a jury, and judgment for plaintiff. Defendant appeals.

BECK, C. J. The District Court found the following facts, and thereupon rendered judgment for plaintiff: The plaintiff is the owner of lot 260, in the northern addition to the city of Burlington, and the defendant owns lot 1, in Wood's subdivision, which adjoins plaintiff's lot on the south. About twenty-five years ago defendant's grantor enclosed lot 1, and made other improvements upon it. The fence on the north was set about fifteen feet over the line upon lot 260, which was unenclosed, and remained in that condition until within the last four or five years. Defendant and her grantor have had actual possession and exercised rights of ownership over the strip of land in controversy since it was enclosed, but have never had any other right or color of title than such as result from the possession stated. They have held the land under the belief that it was covered by the deeds conveying to them lot 1, and were not informed otherwise until within about one year, when, upon an accurate survey, the true line was established. There is no dispute about the other boundaries of lot 1, and defendant's title and possession to the whole of it have never been questioned. Defendant has paid taxes continuously on lot 1, and plaintiff on lot 260.

The question presented by the foregoing facts, as found by the District Court for determination, is this: Is defendant protected in her possession of the land in dispute by the Statute of Limitation?

I. The Statute of Limitation is not available as a defence, unless the defendant holds the land under color of title, or has had actual adverse possession for the full time limited by the Statute for the

¹ *Reader v. Williams*, 216 S. W. (Mo.) 738, accord. *Contra, Clark v. McClure*, 10 Grat. (Va.) 305. Compare *Urbanec v. Urbanec*, 174 N. W. (N. D.) 880.

commencement of the action. *Right v. Keithler*, 7 Iowa, 92; *Jones v. Hockman*, 12 Id. 101; s. c. 16 Id. 487. It is not claimed that in the case before us defendant holds color of title to the land, but recovery is resisted on the ground that she and her grantor have been in the adverse possession of the property for the time which, under the Statute, will bar the action. We are required to determine whether the possession relied upon is of that character which is deemed by the law adverse.

An essential ingredient of adverse possession is a *claim of right* hostile to the true owner. So, if one enter upon the land of another, without any color of title, or claim of right, the possession thus acquired is not adverse, but the possessor will be deemed by the law to hold under the legal owner. In such a case no length of possession will make it adverse. *Jones v. Hockman*, *supra*; *Bradstreet v. Huntington*, 5 Pet. 402 (440); *Ricard v. Williams*, 7 Wheat. 59; *Comegys v. Corley*, 3 Watts, 280; *Gray v. McCreary*, 4 Yates, 494; *Brandt ex dem. Walton v. Ogden*, 1 Johns. 156; *Jackson ex dem. Bonnell et al. v. Sharp*, 9 Id. 163.

II. The *quo animo* in which the possession was taken and held is a test of its adverse character. The inquiry, therefore, as to the intention of the possessor, is essential in order to determine the nature of his possession, and, before his possession may be pronounced adverse, it must be found that he intended to hold in hostility to the true owner. *McNamee v. Moreland*, 26 Iowa, 97. See also *Bradstreet v. Huntington*, *supra*, and the other authorities last cited.

III. The facts relied upon to constitute adverse possession must be strictly proved; they cannot be presumed. The law presumes that the possession of land is always under the regular title, and will not permit this presumption to be overcome by another presumption. There can be no such thing as conflicting legal presumptions. *McNamee v. Moreland*, *supra*; *Fele v. Doe*, 1 Blackf. 129.

IV. The defendant's grantor, when he entered upon the land in dispute, did not claim title thereto. He claimed title to lot 1, but to no part of lot 260. It is very plain that, under the authorities above cited, the claim of right must be as broad as the possession. Defendant's claim was limited to lot 1 — his possession covered that lot, and a part of lot 260; he took possession of more land than he claimed. But, is the fact, that the *belief* of defendant and her grantor, that lot 1 extended to the line of their possession, equivalent in law to a *claim* of title to the land in dispute? The term *belief* implies an assent of the mind to the alleged fact, and is not supported by knowledge. One may believe a proposition without making it known, or without possessing any knowledge upon the subject. It is, or may be, a passive condition of the mind, prompting in neither action nor declaration. The term *claim* implies an active assertion of right, — the demand for its recognition. This assertion and demand need not be made in words; the party may speak by his acts

in their support, as by the payment of taxes, erection of improvements, etc. One may *believe* that he has a right to land without asserting or demanding it. But it is said the right is asserted by the possession. This cannot be admitted, for the possession, to be supported by the law, must be under claim of right. The argument is this: The lawful possession is proved by the claim of right, which, in turn, is established by the possession. The reasoning is within a very narrow circle. But there is another objection to it upon a principle above stated. The adverse character of the possession must be strictly proved, and, in the argument just noticed, it is inferred from an alleged condition of mind.

As we have seen, the *intention*, the *quo animo* of the possessor, must be shown. This cannot be done by mere proof of possession: it must be shown to exist under certain conditions, to be qualified by the existence of a claim of right; for the adjective characteristics of a thing cannot be shown by proof of the mere existence of the thing itself.

In this case we have the possession admitted. As we have seen, it must be shown to be adverse under a claim of right. Simple belief on the part of defendant of her right to the land, we have pointed out, is not equivalent to, nor will it supply the place of, the claim required by the law, and, as we have shown, possession will not establish the *quo animo*. There is, then, in the case, absolutely no evidence of the adverse holding of defendant.

The conclusion we have announced is supported by decisions of this court, and by other authority. *McName v. Moreland*, 26 Iowa, 97; *Brown v. Cockerell*, 33 Ala. 45; *Hamilton v. Wright*, 30 Iowa, 480; *Burnell, Adm'r of Russell, v. Maloney*, 39 Vt. 579; *St. Louis University v. McCune*, 28 Mo. 481; *Riley v. Griffin et al.*, 16 Ga. 141; *Brown v. Gay*, 3 Greenl. 126; *Ross v. Gould*, 5 Id. 204; *Lincoln v. Edgecomb*, 31 Me. 345; *Gilchrist v. McLaughlin*, 7 Ired. 310.

V. The following cases are cited by defendant's counsel, in support of views contrary to the doctrines we have just announced. We will briefly notice them.

Burdick v. Heivly, 23 Iowa, 511, is not in conflict with the foregoing views. In that case, there was a claim of right distinctly shown, if not an agreement of the parties to the effect, that the disputed line was in fact the true boundary of the lands. In *Close v. Samm*, 27 Iowa, 503, the right in question related to the flowing back of water upon the mill of plaintiff, by a dam built by the other party. That right was sustained upon evidence of prescription, and it was claimed to the extent exercised by defendant. Here was an express claim of right. In illustration of the ruling made by the court, Mr. Justice Cole supposes the case of conflicting claims to land adjacent to a boundary line. But the case he puts expressly supposes the party availing himself of the Statute of Limitation to *claim* the lands, and to set up an adverse possession under color of title. In

Brown v. Bridges, 31 Iowa, 138, the right of plaintiff to recover is based upon prescription, and it clearly appears that he had *claimed* and held possession of the land in dispute, and upon that ground set up his prescriptive title. In *Stuyvesant v. Tomkins*, 9 Johns, 61, the point decided is, that trespass, *quære clausum fregit*, will not lie on behalf of one not in possession of lands. Whatever appears in that case, relating to the point under consideration, was said *arguendo*. In *Lawrence v. Hunt*, 9 Watts, 64, the claim under the Statute was based upon an actual survey, and in *Brown v. McKenney*, Id. 565, it is held that the party setting up adverse possession is protected therein, as it is expressly said by the court, under a *claim* of title to the land.

In these authorities, there is to be found nothing in conflict with the conclusions we have reached in this case.

In our opinion, the ruling of the District Court upon the facts found is correct. Affirmed.¹

¹ The doctrine of this case seems to have had its origin in *Brown v. Gay*, 3 Greenl. (Me.) 126, and *Gilchrist v. McLaughlin*, 7 Ired. (N. C.) 310. It has prevailed to a considerable extent in the United States. *Brown v. Cockerell*, 33 Ala. 38; *Harris v. Byrd*, 202 Ala. 78; *Winn v. Abeles*, 35 Kan. 85; *St. Louis University v. McCune*, 28 Mo. 481; *Ouzts v. McKnight*, 114 S. C. 303. Its force has, however, been diminished by later authorities. In *Taylor v. Fomby*, 116 Ala. 621, 626, the court said: "It is also well settled, that if one of two adjacent land owners extend his fence so as to embrace within his inclosure lands belonging to his neighbor, in ignorance of the true boundary line between them, and with no intention of claiming such extended area, but intending to claim adversely only to the real and true boundary line, wherever it may be, such possession will not be adverse or hostile to the true owner. But if the fence is believed to be the true line, and the claim of ownership is to the fence, even though the established division is erroneous, a different rule will apply, as has been held; for, in such case, there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of a mistake." To the same effect are *Miller v. Mills County*, 111 Iowa 654, 658; *Edwards v. Fleming*, 83 Kan. 653; *Richardson v. Watts*, 94 Me. 476, 487; *Shotwell v. Gordon*, 121 Mo. 482, 484; *Schaubach v. Dillemuth*, 108 Va. 86, 89; *Skanzi v. Novak*, 84 Wash. 38, 45. See *Evert v. Turner*, 184 Iowa 1253; *Bradstreet v. Winter*, 109 Atl. (Me.) 482; 2 Tiffany, Real Prop., 2d ed., § 505.

The following cases are contrary to *Grube v. Wells*: *Wagner v. Meinzer*, 177 Pac. (Cal.) 293; *French v. Pearce*, 8 Conn. 439; *Daily v. Boudreau*, 231 Ill. 228; *Cassidy v. Lenahan*, 294 Ill. 503; *Carpenter v. Rose*, 186 Ky. 686; *Crowder v. Neal*, 100 Miss. 730; *Ovig v. Morrison*, 142 Wis. 243. See *Heinrichs v. Polking*, 215 S. W. (Ky.) 179; *Erck v. Church* and notes, *post*, p. 86.

The decisions are collected in 33 L. R. A. n. s. 923 note.

NOTE—Adverse possession, in order to be the foundation of title, must be actual, open, exclusive and continuous. See *Ward v. Cochran*, 150 U. S. 597, 606–610. As to what constitutes actual and open possession, see *Baughner v. Boley*, 63 Fla. 75 (statute); *St. Louis A. & T. R. R. Co. v. Nugent*, 152 Ill. 119; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Bensdorff v. Uihlein*, 132 Tenn. 193; and compare cases on constructive possession, *post*, p. 67 *et seq.*

As to the burden of proof that the possession is adverse, see 2 Tiff. Real Prop., 2d ed., § 503, where many cases are collected. See New York, Laws

1920 Chap. 925., Art. 2, § 35, *ante* p. 30. The following states have similar legislation: California, Code Civ. Proc., (1915), § 321; Florida, Comp. Laws (1914), § 1720; Idaho, Comp. Stats. (1919), § 6599; Montana, Rev. Code (1907), § 6435; North Dakota, Comp. Laws (1913), § 7365; South Dakota, Comp. Laws (1913), Code Civ. Proc., § 46; Utah, Comp. Laws (1917), § 6451; Wisconsin, Stats. (1915), § 4210. Compare, Michigan, Comp. Laws (1915), § 12314; Nevada, Rev. Laws (1912), § 4955.

As to exclusive possession, see *Tracy v. N. & W. R. R. Co.*, 39 Conn. 382; *Bloodsworth v. Murray*, 114 Atl. (Md.) 575; *Bailey v. Carleton*, 12 N. H. 9, *post*, p. 71; *Weeks v. Dominy*, 161 App. Div. 414, 212 N. Y. 563.

As to continuous possession, see *Kentucky Coal Co. v. Wilder*, 165 Ky. 293; *Britt v. Houser*, 171 Ky. 494; *Meek v. Davis*, 189 Ky. 64; *Nelson v. Johnson*, 189 Ky. 815, 827, 828; *Stewart v. Small*, 119 Me. 269; *Bowen v. Guild*, 130 Mass. 121; *Dean v. Goddard*, 55 Minn. 290; *Ovig v. Morrison*, 142 Wis. 243; and compare cases on tacking, *post*, p. 80 *et seq.*

As to whether by adverse possession a public right of way, which has been dedicated, or taken by a municipality, can be extinguished, the cases are in conflict. 3 Dillon, Mun. Corp., 5th ed., §§ 1187-1194; 2 Tiffany, Real Prop., 2d ed., § 417, p. 1536.

NOTE

CONVEYANCE BY THE OWNER OF LANDS WHICH ARE IN THE ADVERSE POSSESSION OF ANOTHER. "The Statute of 32 Hen. VIII. c. 9 (1540) enacted that no person should buy or obtain 'any pretended rights or titles' to any lands, tenements or hereditaments, upon pain that the buyer and seller should each forfeit the value. This Statute not only imposes a penalty but avoids the conveyance. *Doe d. Williams v. Evans*, 1 C. B. 717 (1845). It is said to have been in affirmance of the common law. *Ib.* See *Hathorne v. Haines*, 1 Greenl. 238, 247 (Me. 1821). [*Paton v. Robinson*, 81 Conn. 547, 551, 552; *Powers v. Van Dyke*, 27 Okla. 27.]

"In many States by statute this rule has now been abolished and the conveyance by the owner is good even against the person in possession. See Stimson, Am. St. Law, § 1401; Mass. Rev. Laws, c. 127, § 6. And in some States, the same result has been reached without the aid of statutes. *Cresson v. Miller*, 2 Watts, 272 (Pa. 1834); *Hall v. Ashby*, 9 Ohio, 96 (1839); *Poyas v. Wilkins*, 12 Rich. 420 (So. Car. 1860); *Bentinck v. Franklin*, 38 Tex. 458 (1873). [*Booth v. Young*, 149 Ga. 276; *Gurule v. Duran*, 20 N. M. 348.]

"As there is no seisin of easements the rule against champertous conveyances has no application to them. See *Randall v. Chase*, 133 Mass. 210, 214 (1882); *Corning v. Troy Iron Factory*, 40 N. Y. 191, 204 (1869). And it has been held not to apply to a conveyance to a purchaser at a sale on execution or otherwise by order of court. See *McGill v. Doe d. McCall*, 9 Ind. 306 (1857). It was further held, in *Webb v. Thompson*, 23 Ind. 428 (1864), that the deed by a purchaser at an execution sale was good, although the land continued in the adverse possession of the judgment debtor. But the contrary was held in *Bernstein v. Humes*, 60 Ala. 582 (1877). See also *Violett v. Violett*, 2 Dana, 323 (Ky. 1834). [*Etchen v. Cheney*, 235 F. R. 104; *Vary v. Sensabaugh*, 156 Ala. 459; *Hicks v. Burgess*, 185 Ala. 584; *Bunch v. High Springs Bank*, 89 So. (Fla.) 121; *Williams v. Poole*, 31 Ky. L. Rep. 757; *Anderson v. Daugherty*, 169 Ky. 308; *Warner v. Wickizer*, 61 Okla. 200.]

"If the owner peaceably enters upon the land and there delivers a deed thereof, it has been held that his title passes. *Warner v. Bull*, 13 Met. 1 (Mass. 1847). And the deed of the owner is usually held to be good against all the world except the person in possession and those claiming under him. *Middleton v. Arnolds*, 13 Grat. 489 (Va. 1856); *McMahan v. Bowe*, 114 Mass. 140 (1873). But see *Brinley v. Whiting*, 5 Pick. 347 (Mass. 1827);

Altemus v. Nickell, 115 Ky. 506 (1903). [*Paton v. Robinson*, 81 Conn. 547, 552; *Gibbs v. McCoy*, 70 Fla. 245; *Vernor v. Poorman*, 59 Okla. 105.]

"If the grantee enters peaceably upon the land he has been allowed to use his title to defend himself against a writ of entry. *Cleaveland v. Flagg*, 4 Cush. 76 (Mass. 1849).

"And when the grantee has sued in the name of his grantor, and recovered judgment, it was *held*, that the grantor could not release to the person in possession. *Edwards v. Parkhurst*, 21 Vt. 472 (1849). But a deed from the grantee to the person in possession was held to release the right of the grantor. *Farnum v. Peterson*, 111 Mass. 148 (1872). Where the owner gave a deed of the land to a third person and thereafter gave a deed to the person in possession who had knowledge of the prior deed, it was *held*, that the owner could not then sustain an action for the benefit of his first grantee to eject the person in possession. *Dever v. Hagerty*, 169 N. Y. 481 (1902).

"After judgment in an action against the person in possession, brought by the grantee of the owner in the name of his grantor, the person previously in possession cannot bring trespass against the grantee for acts done before the rendering of the judgment, *Edwards v. Roys*, 18 Vt. 473 (1846). See *Hathorne v. Haines*, 1 Greenl. 238 (Me. 1821).

"That there may be a possession which is not adverse so as to make a deed champertous and which yet may be adverse so as to raise the bar of the Statute of Limitations, is said in *Crary v. Goodman*, 22 N. Y. 170 (1860). And see *Brown v. Gay*, 3 Greenl. 126, 130 (Me. 1824) and other cases cited in the note on p. 66 *supra*. [*Tavis v. Bruce*, 172 Ky. 396; *Combs v. Adams*, 182 Ky. 762, 767; *Green v. Horn*, 207 N. Y. 489, 492; *Flesher v. Callahan*, 32 Okla. 283.] 3 Gray, Cas. on Prop., 2d ed., p. 553. (The citations in brackets have been added by the editor).

D. Constructive Possession. ✓

JACKSON d. GILLILAND v. WOODRUFF

1 Cowen (N. Y.) 276. 1823.

EJECTMENT for land in Plattsburgh. The defendant relied on the Statute of Limitations.¹

WOODWORTH, J. In September, 1794, Z. Platt executed a quit-claim deed to Nathaniel Platt for 783 acres of land, purporting to convey, thereby, lands lying between the east and south lines of allotted lands in Plattsburgh, and the line of Friswell's Patent. On examining the boundaries, and the map annexed to the case, it will be found not to include any land; for there is no gore between the two patents. The description follows: "Beginning at the distance of 7 chains, 8 links, north from the southeast corner of lot No. 99, in the second division of Plattsburgh; thence east, 27 chains and 50 links, to John Friswell's Patent." Now, as it has been shown that Friswell's Patent joins on Plattsburgh, the line cannot be extended easterly. If it was so extended, it would run on lands included in that patent, which is not admissible under the words of the deed. The next course is to the northwest corner of the patent, which must

¹ The statement of facts is omitted, and only that portion of the opinion which deals with the question of constructive possession is given.

be understood the true northwest corner of Friswell, as proved by the plaintiffs; thence east, in the east bounds of Friswell's Patent, until the north line, to the lotted land in Plattsburgh, will include 783 acres, between that line and lot No. 101, in the second division of Plattsburgh. By tracing these lines on the map, it will be seen that a line only is given. No land is included: consequently the deed is a nullity, inasmuch as nothing is granted. The question, then, is whether a claim of title under such an instrument, and an annual occupancy of part, can constitute a good adverse possession beyond the parcel so occupied.

It is well settled that a continued possession for twenty years, under pretence or claim of right, ripens into a right of possession which will toll an entry. It has never been considered necessary, to constitute an adverse possession, that there should be a rightful title. *Jackson v. Wheat*, 18 John. 44; *Smith v. Lorillard*, 10 John. 356; *Smith v. Burtis*, 9 John. 180; 13 John. 120; 2 Caines, 83. The party who relies on an adverse possession must, in the language of Kent, C. J., in *Jackson v. Shoemaker*, 2 John, 234, show "substantial enclosure, an actual occupancy, a *pedis possessio*, which is definite, positive, and notorious, when that is the only defence to counter-vail a legal title:" and in *Doe v. Campbell*, 10 John. 477, it is said, "adverse possession must be marked by definite boundaries, and be regularly continued down, to render it availing." 1 John. 156. There is no doubt that actual occupancy and a claim of title, whether such claim be by deed or otherwise, constitute a valid adverse possession to that extent. But when a party claims to hold adversely a lot of land, by proving actual occupancy of a part only, his claim must be under a deed or paper title. This distinction has been uniformly recognized and acted upon in this court. It is on this latter ground the defendants must rest, if their possession can avail. Their defence is that Z. Platt, in 1794, conveyed 783 acres to N. Platt, including the premises; that the first improvement was made in 1794 under Platt, being a small parcel, not exceeding two acres, which, together with the premises in question, afterwards taken under him, have been continued to the time of commencing this action. This proof does not make out an adverse possession to the premises. Color of title under a deed, and occupancy of part, is sufficient proof as to a single lot; yet it follows from the doctrine laid down that the deed, or paper title, under which the claim is made, must in the description include the premises. If the title is bad, it is of no moment but if no lands are described, nothing can pass. The deed is a nullity, and never can lay the foundation of a good adverse possession beyond the actual improvement. There is no evidence here to show how far Platt's claim extended, unless resort is had to the deed. Boundaries, therefore, including the premises, were indispensable in order to give this defence the semblance of plausibility. The defendants stand on the same ground as if no deed had

been produced and then the possession cannot extend beyond the place actually occupied.

In *Jackson ex dem. Dervient v. Lloyd*, decided October Term, 1820, but not reported, it appeared that the defendant had a deed for lot No. 4, but took possession of lot No. 5, adjoining, believing it to be his lot, and claiming it as such. It was held that the defendant could not establish an adverse possession to the whole lot, by the actual improvement of a part, because no part of No. 5 was included in the deed.

But if the deed had been perfect in the description, and included 783 acres of Friswell's Patent, the occupancy of a part would not make out an adverse possession to the whole quantity conveyed. The doctrine of adverse possession, applied to a farm or single lot of land, is in itself reasonable and just. In the first place, the quantity of land is small. Possessions thus taken, under a claim of title, are generally for the purpose of cultivation and permanent improvement. It is generally necessary to reserve a part for woodland. Good husbandry forbids the actual improvement of the whole. The possessions are usually in the neighborhood of others; the boundaries are marked and defined. Frequent acts of ownership, in parts not cultivated, give notoriety to the possession. Under such circumstances, there is but little danger that a possession of twenty years will be matured against the right owner; if it occasionally happens, it will arise from a want of vigilance and care in him who has title. It is believed that no well-founded complaint can be urged against the operation of the principle; but the attempt to apply the same rule to cases where a large tract is conveyed would be mischievous indeed. Suppose a patent granted to A. for 2000 acres; B., without title, conveys 1000 of the tract to C., who enters under the deed, claiming title, and improves one acre only; this inconsiderable improvement may not be known to the proprietor, or if known, is disregarded for twenty years. Could it be gravely urged that here was a good adverse possession to the one thousand acres? If it could, I perceive no reason why the deed from B. to C. might not include the whole patent, and after the lapse of twenty years equally divest the patentee's title to the whole; for there would exist an actual possession of one acre, with a claim of title to all the land comprised in the patent. No such doctrine was ever intended to be sanctioned by the court.¹ It may therefore be safely affirmed that a small possession, taken under the deed to N. Platt, cannot under any circumstances be a valid possession of the whole 783 acres, but is

¹ *Louisville & N. R. R. Co. v. Mexico Land Co.*, 82 Miss. 180 (*semble*); *Thompson v. Burhaus*, 61 N. Y. 52; *Chandler v. Spear*, 22 Vt. 388, 404; *Pepper v. Dowd*, 39 Wis. 538, *accord.* See *Zirngibl v. Calumet Dock Co.*, 157 Ill. 430; *Murphy v. Doyle*, 37 Minn. 113; *Paine v. Hutchins*, 49 Vt. 314.

But compare *Marietta Co. v. Blair*, 173 Ala. 524; *Hicks v. Coleman*, 25 Cal. 122; *Furgerson v. Bagley*, 95 Ga. 516; *Hayes v. Lumber Co.*, 180 N. C. 252; *Taliaferro v. Butler*, 77 Tex. 578. See 6 Col. L. Rev. 582.

limited to the parcel improved. If the doctrine contended for prevails, it would sanction this manifest absurdity that a possession under Platt's deed, which conveyed no title, would, as to its legal effect, be more beneficial than a possession taken under the proprietors of Friswell's Patent, where there is not only title, but a good constructive possession, in consequence of the grant, and actual occupancy and improvement of a part. It cannot be useful to pursue the subject farther.

I am of opinion that the plaintiff is entitled to judgment for an undivided fourth part of the premises.¹

SAVAGE, C. J., concurred in a judgment for the plaintiff for one undivided fourth part of the premises, and the court gave
Judgment accordingly.

BAILEY v. CARLETON

12 N. H. 9. 1841.

WRIT OF ENTRY, to recover two tracts of land in the lower village in Bath, one of said tracts being ten rods in length, and the other being four square rods of land, situated immediately south of and adjoining the first tract; both constituting a narrow strip of land, situated betwixt the main road through Bath village, and the Amonosuck River.

The tract of land first described, and a house lot opposite to the same, on the other side of the road, were conveyed to Amos Town by Moses P. Payson, by two several deeds, executed on the 27th of March, 1807; and the tract containing four square rods was conveyed by said Payson, in November, 1807, to Buxton & Blake, who sold to one Morrison, and, in 1810, Morrison sold to said Town.

¹ The opinion of SUTHERLAND, J., is omitted.

A deed void for want of formalities or for want of capacity of the grantor may be color of title. *Wright v. Mattison*, 18 How. (U. S.) 50; *Hecock v. Van Dusen*, 80 Mich. 359; *Miesen v. Canfield*, 64 Minn. 513; *Ellington v. Ellington*, 103 N. C. 54; *Swift v. Mulkey*, 17 Oreg. 532. Even though the conveyance is void on its face. *Reddick v. Long*, 124 Ala. 260; *Wilkinson v. Atkinson*, 77 Cal. 485; *Barger v. Hobbs*, 67 Ill. 492; *Davis v. Davis*, 68 Miss. 478; *Power v. Kitching*, 10 N. D. 254. But see cases involving statutes in regard to adverse possession under tax deeds. *Redfield v. Parks*, 132 U. S. 239; *Larkin v. Wilson*, 28 Kan. 513; *Fischen v. Olsen*, 155 Mich. 320; *Wofford v. McKinna*, 23 Tex. 36; *Matthews v. Blake*, 16 Wyo. 116. Compare *Bloom v. Strauss*, 70 Ark. 483; *DeForesta v. Gast*, 20 Colo. 307; *Beverly v. Burke*, 9 Ga. 440, 443; *Ipock v. Gaskins*, 161 N. C. 673, 684.

There may be color of title under a defective decree of court. *Bynum v. Thompson*, 3 Ired. Law (N. C.) 578 (*semble*); *Reedy v. Canfield*, 159 Ill. 254; *Jones v. Thomas*, 124 Mo. 586.

The jurisdictions in which there are statutes in regard to color of title will be found *ante*. p. 29, note. See decisions in those states in note to the principal case.

In February, 1813, Amos Town sold the three tracts of land to his brother, Solomon Town, and in April, 1815, Solomon Town reconveyed the house lot opposite the demanded premises, to Amos Town, but did not include, in the description, the strip of land opposite, and now in controversy.

October 19, 1815, Amos Town conveyed the aforesaid three several tracts, giving separate descriptions of each tract, to Ebenezer Carleton, and subsequently Carleton's title was conveyed to these defendants.

Solomon Town, in June, 1830, conveyed the demanded premises to one John Welsh. Welsh, in February, 1837, conveyed to the plaintiff, and this suit was brought for the recovery of the demanded premises, the 15th of April, 1837.

It appeared that Ebenezer Carleton, on his purchase of Amos Town in October, 1815, entered into possession of the house lot named in his deed, and lived on and occupied the same for many years, until it was conveyed to the defendant, E. Carleton, Jr.

In 1821, Ebenezer Carleton caused a small building to be removed on to the land in controversy, and from that time to the present it has remained there, occupied by tenants under him and these defendants.

The defendants claimed to hold the land by virtue of peaceable and undisturbed possession, by themselves and their grantor, for a period of twenty years. It appeared that until 1821 no building had been placed upon the premises, and that the premises had not been enclosed in any manner; that from 1815 to 1821, and since, Ebenezer Carleton had been in the habit, occasionally, of leaving carts, ploughs, and farming utensils upon this land, and also of leaving lumber upon it. Evidence was offered to show that it had been a common practice, by teamsters and owners of lumber, for thirty or forty years, to lay lumber upon that side of the road, in Bath village, upon this tract, and above and below it, and that said Carleton and other individuals had been in the habit of laying lumber along the river bank in this manner.

It was contended, by the defendants' counsel, that Ebenezer Carleton having entered upon the house lot, claiming title to and occupying the same, such entry extended to the contiguous tracts described in the same deed, and that entry and occupation of one of the tracts extended to the whole, in the same manner as though they had been conveyed in one description; that the defendants' grantor having entered upon and disseised the plaintiff's grantor, October 19, 1815, and the plaintiff never having re-entered before action brought, he had no legal seisin in the demanded premises within twenty years next before the commencement of his action, and his suit, therefore, could not be maintained; and that the laying of lumber on the demanded premises, by persons claiming no right thereto, would not affect the exclusive character of the defendants' adverse possession.

The court instructed the jury that an entry upon, and occupation of one of the tracts conveyed, would not extend to the other tracts described in the deed, so as to give a title to them by possession; that entry upon, and occupation of, any portion of the demanded premises would extend to the whole tract entered upon; that it was not essential that any portion of the land should be enclosed, in order to constitute an adverse possession; that such possession might be acquired by the laying of lumber upon said tract, or otherwise occupying it as a place of deposit for farming utensils, &c., but that such possession must be an open, visible possession, such as would give reasonable notice of such adverse possession, to the owner.

A verdict was rendered for the plaintiff, and the defendants moved to set the same aside, for misdirection.

PARKER, C. J.¹ The general rule that where a party having color of title enters into the land conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed, seems to be settled by the current of authorities, 3 N. H. Rep. 27, *Riley v. Jameson*; Ditto, 49, *Lund v. Parker*, and cases cited.

And such entry may operate as a disseisin of the whole tract; and the possession under it, continued for the term of twenty years, may be deemed an adverse possession, which will bar the entry of the owner after that lapse of time. 3 N. H. Rep. 49; 13 Johns. R. 118, *Jackson v. Ellis*; Ditto, 406, *Jackson v. Smith*; 18 Johns. 355, *Jackson v. Newton*.

Exceptions have been suggested to the rule in some cases. One is, where a large tract of land is embraced in the deed, and a small part only has been improved. 1 Cowen, 276, *Jackson v. Woodruff*; 6 Cowen, 677, *Jackson v. Vermilyea*. Another, where the deed under which the claim is made includes a tract greater than is necessary for the purpose of cultivation, or ordinary occupancy. 8 Wend. R. 440, *Jackson v. Oltz*.

These exceptions seem not to be very definite in their application, for lots, like other things, are large or small by comparison, and a tract which would be much too large for cultivation by one, would not suffice for another. But they serve to show the principle upon which the rule is founded. It is, that the entry and possession of the party is notice to the owner of a claim asserted to the land; that the limits of such claim appear from the deed; and that if the owner for twenty years after such entry, and after notice, by means of the possession, that an adverse claim exists, asserts no rights, he may well be presumed to have made some grant or conveyance, co-extensive with the limits of the claim set up, or that, after such lapse of time, a possession, under such circumstances, ought to be quieted.

¹ Woods, J., having been of counsel, did not sit.

There should be something more than the deed itself, and a mere entry under it, — something from which a presumption of actual notice may reasonably arise. It is not necessary to show actual knowledge of the deed. Acts of ownership, raising a reasonable presumption that the owner, with knowledge of them, must have understood that there was a claim of title, may be held to be constructive notice; that is, conclusive evidence of notice. 8 N. H. Rep. 264, *Rogers v. Jones*. The owner may well be charged with knowledge of what is openly done on his land, and of a character to attract his attention. The presumption of notice arises from the occupation, long continued; and the notice of the claim may well be presumed, as far as the occupation indicates that a claim exists, and the deed, or color of title, serves to define specifically the boundaries of the claim or possession. If the occupation is not of a character to indicate a claim which may be co-extensive with the limits of the deed, then the principle that the party is presumed to enter adversely according to his title, has no sound application, and the adverse possession may be limited to the actual occupation.

Thus cutting wood and timber, connected with permanent improvements, may well furnish evidence of notice that the claim of title extends beyond the permanent improvements, and the deed be admitted to define the precise limits of the claim and possession, provided the cutting was of a character to indicate that the claim extended, or might extend, to the lines of the deed. It might, at least, well indicate a claim to the whole of a tract allotted for sale and settlement, of which the party was improving part, unless there was something to limit the presumption. But no presumption of a claim, and of color of title beyond the actual occupation, could arise respecting other lots than that of which the party was in possession. And where the possession was in a township, or other large tract of land, which had never been divided into lots for settlement, no particular claim, beyond the actual occupation, would be indicated, and of course no notice of any such claim of title should be presumed. 6 Cowen's R. 617, *Jackson v. Richards*; 15 Wend. R. 597, *Sharp v. Brandon*.

If the possession was not of a character to indicate ownership, and to give notice to the owners of an adverse claim, although the grantee might be held to be in possession according to his title, in a controversy with one who should make a subsequent entry without right, his possession ought not to be held adverse to the true owner, to the extent of his deed, merely by reason of the deed itself, even if recorded, nor by any entry under it. There are several cases which tend to sustain this view of the principle. 6 Pick. R. 172, 176, *Poignard v. Smith*; 13 Maine R. 178, *Alden v. Gilmore*; 4 Mass. R. 415, *Prop'rs of Kennebeck Purchase v. Springer*; 4 Vermont R. 155, *Hapgood v. Burt*; 1 Peters' R. 41, *Ewing v. Burnet*; 2 Greenl. 176, *Little v. Megquier*.

We are of opinion that the rule cannot apply to a case where a party, having a deed which embraces land to which his grantor had good title, and other land to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into that part which he could not lawfully convey. There is no notice in such case to the owner of the land thus embraced in the deed, and no possession which can be deemed adverse to him. If it may be said that the color of title gives such a constructive seisin and possession that the grantee could maintain trespass against any person who did not show a better right, (that is, a title, or prior possession,) there is nothing in the nature of it which can give it the character of a disseisin, or possession adverse to the true owner, so as to bind him. For that purpose, there must be actual possession of some portion of the land of such owner, and that of a nature to give notice of an adverse claim.

It is not necessary to settle whether an entry into an enclosed lot, under a deed purporting to convey unenclosed lands adjoining, belonging to the same person, would operate as a disseisin of the latter. Where two separate lots, included in the same deed, belong to different owners, an entry into one can in no way operate as a disseisin in relation to the other.

The entry into the house lot, therefore, to which Amos Town, who conveyed, had title, was no disseisin of Solomon Town, who had title to the lot unenclosed, on the other side of the road.

The next question is, what entry into the land itself is sufficient.

Here was an entry in 1821, upon the tract in dispute, and a possession, by placing a building on it, by Ebenezer Carleton, the grantor of the defendants. This was, without doubt, an act of ownership. The character of it was adverse to the title of Solomon Town, and it was of a nature to give notice that Carleton claimed title to that land.

But the possession before that time was of a more ambiguous character.

Ebenezer Carleton, to whom the conveyance was made in 1815, made no entry or use of the lot up to 1821, except by laying lumber upon it, or placing farming utensils there. Those acts by one having a deed, if nothing further was shown, might be held to be a sufficient entry and possession to operate as a disseisin of Solomon Town. But it appeared that so far as the laying of lumber on the lot was concerned, this was no more than Carleton, and divers other persons, had been in the habit of doing before, and that others continued to do the same afterwards. Those acts, prior to 1815, were done by him, and others, without claim of title, and of course in subservience to the title of the true owner. If not acknowledged trespasses, they must have been under a license from Solomon Town. The same acts continued after a deed of other lands, by a person having good title to those lands, could not operate as any notice to the owner of

this tract, that a deed had been made covering his land also, and that there was an occupation under that deed, or under any claim of right to occupy adversely to him. The additional act of leaving farming tools on the land does not seem to change the character of the possession.

It was not, therefore, until 1821, when the building was removed on to the land, that any entry was made upon it by Carleton, from which Solomon Town, with knowledge of the entry, should have understood that Carleton made any claim to the ownership of the lot; and until that time, therefore, there was nothing from which an ouster can be inferred, and no possession by him that can be deemed adverse except at the election of the owner. 21 Pick. 140, *Magoun v. Lapham*; 13 Maine, 336, *Thomas v. Patten*.

*Judgment for the plaintiff.*¹

JACKSON d. HASBROUCK v. VERMILYEA

6 Cowen (N. Y.) 677. 1827.

EJECTMENT for twenty-five acres of land, including a grist mill in Middletown, Delaware County; tried at the circuit in that county, September 1st, 1823, before *Nelson, C. J.*, when a verdict was taken for the plaintiff, subject to the opinion of this court, on a case.

¹ *Kentucky Coal Co. v. Kentucky Union Co.*, 214 F. R. 590, 623; *Henry v. Brown*, 143 Ala. 446; *Marietta Co. v. Blair*, 173 Ala. 524; *Hardie v. Investment Co.*, 81 Ark. 141; *Kimball v. Stormer*, 65 Cal. 116; *Wheatley v. San Pedro R. R. Co.*, 169 Cal. 505; *Gracy v. Fielding*, 71 Fla. 1; *Tennis Coal Co. v. Sackett*, 172 Ky. 729; *Walsh v. Wheelright*, 96 Me. 174; *Turner v. Stephenson*, 72 Mich. 409; *Leavenworth v. Reeves*, 106 Miss. 722; *Schmitt v. Traphagon*, 73 N. J. Eq. 399; *Lewis v. Covington*, 130 N. C. 541; *Hole v. Rittenhouse*, 25 Pa. 491; *Word v. Box*, 66 Tex. 596 accord.

Land in actual possession must adjoin that of which constructive possession is claimed. *Brown v. Bocquin*, 57 Ark. 97; *Georgia Investment Co. v. Holton*, 94 Ga. 551; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; *Louisville Property Co. v. Lawson*, 156 Ky. 288; *Parsons v. Dils*, 172 Ky. 774; *Wilson v. McEwan*, 7 Oreg. 87. And see *Griffin v. Lane*, 90 Ga. 224; *Rowe v. Henderson Naval Co.*, 143 Ga. 756; *Dills v. Hubbard*, 21 Ill. 328; *Parsons v. Dills*, 159 Ky. 471, 172 Ky. 774; *Hornblower v. Banton*, 103 Me. 375; *Morris v. McClary*, 43 Minn. 346; *Brougher v. Stone*, 72 Miss. 647; *Loftin v. Cobb*, 1 Jones Law (N. C.) 406; *Willimette Co. v. Hendrix*, 28 Oreg. 485; *Camp v. Riddle*, 128 Tenn. 294; *Montgomery v. Gunther*, 81 Tex. 320; *Webb v. Richardson*, 42 Vt. 465; *Roller v. Armentrout*, 118 Va. 173.

In order to avail himself of the doctrine of constructive adverse possession the claimant must have an honest belief in the validity of his title. *Gregg v. Sayre*, 8 Pet. (U. S.) 244; *Walsh v. Hill*, 38 Cal. 481; *Reay v. Butler*, 95 Cal. 206; *Lee v. O'Quin*, 103 Ga. 535; *Godfrey v. Dixon Power Co.*, 228 Ill. 487; *Smith v. Young*, 89 Iowa 338; *State v. King*, 77 W. Va. 37. And see *Miller v. Rich*, 204 Ill. 444; *Foulke v. Bond*, 41 N. J. L. 527; and statutes ante, p. 29, note. But compare *Crowder v. Tenn. C. I. & R. R. Co.*, 162 Ala. 151, 158; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, and note in 23 Harv. L. Rev. 56.

WOODWORTH, J. The plaintiff claimed title as the assignee of a mortgage, executed by Noah Ellis to Philip Sickler, dated Oct. 5, 1811.

The premises described, contained twenty-five acres; and included part of a grist mill in possession of the defendant. It appeared that Ellis was in possession of the premises at the date of the mortgage, by virtue of a lease from Gen. Armstrong to him, and continued in possession for several years thereafter, when he surrendered to the mortgagee.

The defendant disclaimed having possession of any part of the twenty-five acres, excepting the mill and mill site. He read in evidence a lease from Armstrong to Andrew Sickler, dated Oct. 10, 1818, for the mill and mill site, and twenty-five acres of land, being the premises in question; which lease was assigned to the defendant. A lease from Armstrong to Ellis, dated May 1, 1802, was given in evidence by the plaintiff. It was admitted to have lately come from the hands of Armstrong. The signatures were erased, and the seals torn off. A corner of the lease with part of the description of the premises was also torn off.

By the case, the lease was to be produced on the argument; it has not been delivered to me. I am, therefore, unable to say, whether it contained any reservation of part of the premises. This fact is then to be ascertained by the testimony of Ellis, which was not objected to. He says the lease was in his possession, when the mortgage was given; that the corner was torn off accidentally; that the seals remained on as long as he held it. The description of the premises included a part of the mill. Ellis also testified, that he did not know that the defendant had ever been in the actual occupation of any part of the premises, excepting the mill and pond. He could not say from recollection, but he believed the lease contained an exception of mill sites, from the circumstances of his obtaining permission from Armstrong to build the mill; and from knowing that mill sites were excepted in all his leases. The witness never claimed the mill site under his lease. On this state of facts, I think we are to consider, that, in the lease to Ellis, the mill site was excepted. I presume by inspection of the lease, it cannot be determined whether excepted or not. This, however, is not expressly stated. I apprehend that neither party would be disposed to rest on parol testimony, as to the contents, unless the lease had been defaced, or a part of it destroyed.

On this statement, the plaintiff made out a title to recover the twenty-five acres, excepting so much as was comprehended within the mill site reserved; provided the defendant was in possession of the land not included in the mill site. He admitted he had possession of a part, (the mill and mill site,) not exceeding two acres. The plaintiff offered no testimony as to the extent of the defendant's actual occupancy; but contends that, as Armstrong conveyed to the person under whom the defendant derives title, the whole twenty-

five acres, the defendant is to be considered as the possessor to that extent.

It appears that the premises are woodland. There are no improvements. The right of Ellis passed to the plaintiff by virtue of the mortgage. The land has never been actually occupied: but it will be recollected that the lease to Ellis contained sixty-three acres, of which the twenty-five acres mortgaged, were parcel; that Ellis actually occupied a part of the sixty-three acres, and claimed title to the whole; so that, although the twenty-five acres were unimproved, he had a good adverse possession to the whole, on the ground of occupancy of a part, and a lease including the sixty-three acres. The conveyance obtained from Armstrong in 1818, although it includes the twenty-five acres, conferred no title to anything but the mill site; neither can it operate so as to transfer to the defendant a constructive possession of the twenty-five acres, in consequence of his having possession of the small parcel comprising the mill site.

I think the defendant must be considered as claiming title to the twenty-five acres; having accepted an assignment of the lease which comprised them.

Color of title under a deed, and occupancy of a part, is sufficient proof to constitute an adverse possession to a single lot. (1 Cowen, 286.) This principle applies only to cases where there is no actual occupancy under a different claim. Thus, if A. takes a lease or conveyance for a lot of sixty-three acres, and improves a part, his possession is valid for the whole lot; not on the ground of having title, which draws the possession after it, until an actual adverse possession commences; but on the ground of a claim of title to the whole, and a possession of part, which constitutes a good adverse possession. When a valid possession is acquired in the latter mode, it cannot be defeated by a subsequent entry on the same lot, making an improvement of a part, and obtaining title to the whole. The effect of such subsequent entry would be, to give the person so entering, a possession of the part actually occupied and improved; but no farther. A constructive possession to the unimproved part of the lot, would remain in him who made the first entry under claim of title, and improved a part.¹ Apply this principle to the present case.

¹ And see *Ralph v. Bayley*, 11 Vt. 521; *Wilson v. Braden*, 48 W. Va. 196; *Robinson v. Lowe*, 66 W. Va. 665.

The actual possession of the true owner of part of his land prevents the adverse possessor from claiming by constructive possession land not occupied by either. The constructive possession of the true owner prevails. *Hunnicutt v. Peyton*, 102 U. S. 333, 369; *Parrish v. Foreman-Blades Co.*, 217 F. R. 335; *Semple v. Cook*, 50 Cal. 26; *Wilkins v. Pensacola City Co.*, 36 Fla. 36; *Hopson v. Cunningham*, 161 Ky. 160; *Stearns Coal Co. v. Boyatt*, 168 Ky. 111; *Schlossnagle v. Kolb*, 97 Md. 285; *Bellis v. Bellis*, 122 Mass. 414; *Bradley v. West*, 60 Mo. 33; *Schmitt v. Traphagen*, 73 N. J. Eq. 399; *Simpson v. Downing*, 23 Wend. (N. Y.) 316; *Renneker v. Warren*, 17 S. C. 139; *Claiborne v. Elkins*, 79 Tex. 380; *Silsby v. Kinsley*, 89 Vt. 263; *Fry v. Stowers*, 98 Va. 417. See *Harriss v. Howard*, 126 Ga. 325; Georgia, Annot. Code

The possession under Ellis, of the twenty-five acres, was not impaired by the assignment of the lease of 1818 to the defendant, and occupation of the mill by him. It appears that Ellis never claimed the mill site. The consequence is, that the defendant was not in possession of the twenty-five acres, except that part thereof which constituted the mill site; and for that portion the plaintiff is not entitled to recover.

Neither can he recover that part which is covered by a part of the mill and the pond, supposed to contain not more than two acres; because Armstrong, having reserved mill sites in his lease to Ellis, afterwards granted the same by a conveyance under which the defendant claims. And although there is no specific description of the quantity of land reserved, it must be intended to include so much as might reasonably be required for the purpose of erecting and carrying on the business of a mill. The defendant has located and entered upon a small parcel for that purpose; which the facts in the case do not enable me to say was unreasonable or too extensive. It is contended that the reservation was merely an easement or privilege; but this is evidently a mistake. A mill site is reserved, which is a reservation of so much land as may be necessary for the purpose of erecting and working a mill. The plaintiff has not shown how much land the defendant actually occupies as a mill site. The defendant admits the quantity of two acres. Under his grant, he must be considered as having located this parcel, as appurtenant and necessary to the mill. There is nothing in the case to show that this was too extensive. It is not material, whether the location was made before or after the execution of the mortgage; for if the mill site was reserved, no right to it was acquired by the mortgage; and the defendant might actually enter on, and locate the premises, as well after as before.

I am, therefore, of opinion that, as to the mill site on which the mill was erected, the defendant has shown title; and as to the twenty-five acres of woodland, the defendant was not, in judgment of law, the possessor. Consequently the defendant is entitled to judgment.

Judgment for the defendant.

(1914), § 4166; *Farrar v. Eastman*, 10 Me. 191. *Contra*, *Currie v. Gilchrist*, 147 N. C. 648; *Simmons v. Defiance Fox Co*, 153 N. C. 257.

It is immaterial whether the constructive possession of the adverse possessor began before or after that of the true owner. *Hunnicutt v. Cook*, 102 U. S. 333, 369; *Semple v. Cook*, 50 Cal. 26; *Altemus v. Long*, 4 Pa. 254; *Sequatchie Coal Co. v. Tennessee Coal Co.*, 131 Tenn. 221; *Combes v. Stringer*, 106 Tex. 427. But see *Richie v. Owsley*, 143 Ky. 1; *Miniard v. Napier*, 167 Ky. 208; *Elliott v. Hensley*, 188 Ky. 444; *Stull v. Rich, Co.*, 92 Va. 253; *Garrett v. Ramsay*, 26 W. Va. 345, 360.

Tacking of constructive adverse possessions. *Kendrick v. Latham*, 25 Fla. 819; *Watts v. Parker*, 27 Ill. 224; *Barger v. Hobbs*, 67 Ill. 592, 597; *Crispen v. Hanavan*, 50 Mo. 536, 549; *Simpson v. Downing*, 23 Wend. (N. Y.) 316.

E. *Tacking Interests.*

DOE d. CARTER v. BARNARD

13 Q. B. 945. 1849.

EJECTMENT for a cottage in Essex. Demise, 13 May, 1848.

On the trial before *Coltman, J.*, at the Essex Summer Assizes, 1848, it appeared from the evidence given for the lessor of the plaintiff that in 1815 one Robert Carter purchased the premises and was let into possession; but as he did not pay all the purchase-money until 1824, no conveyance was executed till that time. Robert Carter, immediately after his purchase in 1815, allowed his son John to occupy the premises rent free as tenant at will; and he continued so to occupy until 1834, when he died, leaving a widow, who was the lessor of the plaintiff, and a son and other children. Robert Carter, the father, was at that time still living. The lessor of the plaintiff had occupied from the time of her husband's death until a short time before the present action was brought. The defendant claimed under a mortgage made by Robert Carter in 1829. For the defendant it was contended that assuming a title to have been shown in John Carter, the lessor of the plaintiff could not recover. The learned judge directed a verdict for the plaintiff, and reserved leave to the defendant to move to enter a nonsuit.¹

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the court.

The lessor of the plaintiff proved no title, but relied on long possession: viz. her own for thirteen years, and her husband's before her for eighteen years; but in so doing she showed that her husband left several children, one of whom was called as a witness. If the husband's possession raised a presumption that he was seised in fee, that fee must have descended on his child, and of course the lessor of the plaintiff must fail. But she contends that because the husband's possession was for less than twenty years, no presumption of a seisin in fee arises; that she is entitled to tack on her own possession to his; and then that the 34th section of Stat. 3 & 4 W. 4, c. 27, which enacts "that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished," has put an end to the right and title of all persons, and transferred the estate to her. If she had been defendant in an action of ejectment, no doubt the non-possession of the lessor of the plaintiff, evidenced by her husband's

¹ Argued before LORD DENMAN, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

and her own consecutive possession for more than twenty years, would have entitled her to the verdict on the words of the 2d section of the Act, without the aid of the 34th section.¹ Therefore it is said that the 34th section must have some further meaning, and must transfer the right. Probably that would be so if the same person, or several persons, claiming one from the other by descent, will, or conveyance, had been in possession for the twenty years. But this lessor of the plaintiff showed nothing to connect her possession with that of her husband by right of any sort; and if she be right in her construction of the 34th section, the same consequence would follow if twenty persons unconnected with each other had been in possession, each for one year, consecutively for twenty years; yet it would be impossible to say to which of the twenty persons the 34th section has transferred the title. Without the aid of this Statute, twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years; provided they were less than twenty: *Doe dem. Harding v. Cooke*, 7 Bing. 346; and the effect of the 34th section would probably be to give the right to the possessor for twenty years, even against the party in whom the legal estate formerly was, and, but for the Act, would still be, where he had not obtained the possession till after the twenty years; but then we apprehend, as before stated, that such twenty years' possession must be either by the same person or several persons claiming one from the other, which is not the case here.

The lessor of the plaintiff must therefore rely on her own possession for thirteen years as sufficient against the defendant, who has turned her out and shows no title himself. According to the case of *Doe dem. Hughes v. Dyball*, Moo. & M. 346, that possession for thirteen years would be sufficient; for in that case the lessor of the plain-

¹ So, *Doe d. Goody v. Carter*, 9 Q. B. 863.

Stat. 3 & 4 Wm. IV, c. 27, §§ 2, 7, provided as follows: "II. And be it further enacted, that after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

"VII. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

tiff showed only one year's possession, and yet Lord Tenterden said, "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must show your title." See also *Doe dem. Humphrey v. Martin*, Car. & Marsh. 32. These cases would have warranted us in saying that the lessor of the plaintiff had established her case, if she had shown nothing but her own possession for thirteen years. The ground, however, of so saying, would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action, but that such possession is *prima facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee. Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was *prima facie* evidence of his seisin in fee; and, as he died in possession and left children, it was *prima facie* evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail; and therefore she has by her own showing proved the title to be in another, of which the defendant is entitled to take advantage. On this ground we think that the rule for a nonsuit must be made absolute.

*Rule absolute for a nonsuit.*¹

FANNING v. WILLCOX

3 Day (Conn.) 258. 1808.

MOTION for a new trial.

This was an action of ejectment, to which the general issue was pleaded.

On the trial, the plaintiff claimed the land in question as devisee under the will of Thomas Fanning, deceased, to whom it had been appraised and set off under an execution against Joseph Noyes. It was admitted that the plaintiff had a good and legal title, unless barred by the Statute of Limitations.

The defendants were in possession as tenants under Nathaniel Palmer. It appeared that after the levy of Thomas Fanning's execution,² Noyes continued in possession until within fifteen years of the time of bringing this action, but had gained no title. Nathaniel Palmer, having no title, then commenced an action of ejectment against Noyes for the land. Noyes suffered judgment to pass against

¹ See *Peele v. Chever*, 8 All. (Mass.) 89; *Dixon v. Gayser*, 17 Beav. 421, 430; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Willis v. Earl Howe*, [1893] 2 Ch. 545, 553; *Perry v. Clissold*, [1907] A. C. 73; *Groom v. Blake*, 6 Ir. Com. L. Rep. 400, 410; Professor J. B. Ames in 3 Harv. L. Rev. 323-325.

² It is not expressly stated in the motion that the levy of Fanning's execution took place, and the adverse possession of Noyes commenced, more than fifteen years before the plaintiff brought his action; but this was the fact, and the case proceeds entirely upon the supposition of its existence.—REP.

Pl. claimed
land as devisee
under will
J. H.

sef.

him by default, and abandoned the land; upon which Palmer took possession, without the levy of an execution.

The court, in their charge to the jury, instructed them that if they should find that the plaintiff's record title was complete, and the defendants, or those under whom they claim, had no title of record, yet the law was so that if any other person had been in possession of the land, claiming adversely to the plaintiff's title, and the possession of such person, together with the possession of the defendants, and those under whom they claim, amounted to a period of more than fifteen years previous to the commencement of this action, during which the plaintiff was ousted of the possession, he was not entitled to recover. The jury found for the defendants; and the plaintiff moved for a new trial, which motion was reserved for the opinion of the nine judges.

BY THE COURT.¹ Actual ouster and adverse possession of any lands, tenements, or hereditaments, for fifteen years after the title, or cause of action accrued, and before suit brought, bars the plaintiff of his right of entry thereafter, whether the ouster and adverse possession be by the same person or persons, for the whole term of fifteen years, or by different persons for different periods, making fifteen years in the whole; provided the disseisin and adverse possession have been continued and uninterrupted; and provided that the plaintiff does not come within any of the exceptions mentioned in the provisos of the Statute, extending the term of time, in which entry may be made.

New trial not to be granted.²

¹ BRAINERD and GRISWOLD, JJ., having been concerned as counsel in this cause, did not sit.

² "The only other question presented by the case is, whether the statute of limitation was a bar to the plaintiff's recovery. It appears that there was a continual adverse possession for more than twenty years, but that Hugh Shannon, who first took the possession of the land in controversy, before he had remained in possession twenty years surrendered the possession to the defendants or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim, and that they had not had the land in possession twenty years prior to the commencement of this suit.

"This circumstance, it is urged on the part of the plaintiff, prevents the statute from operating as a bar to his recovery. But we cannot perceive any principle upon which it can have such an effect. According to the literal import of the statute, the plaintiff could only enter upon the land within twenty years after his right of entry accrued, and, consequently, an adverse possession for that length of time will toll his right. Nor can it, in the reason and nature of the thing, produce any difference, whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor whether the possession be held by the same or a succession of individuals, provided the possession be a continued and uninterrupted one."—*Shannon v. Kinny*, 1 A. K. Marsh. (Ky.) 3, 4 (but see *Winn v. Wilhite*, 5 J. J. Marsh. (Ky.) 521, 524; *Miniard v. Napier*, 167 Ky. 208). And see *Davis v. McArthur*, 78 N. C. 357 (changed by statute. North Carolina, Stats. (1919), § 430; *May v. Mfg. Co.*, 164 N. C. 262, 265); *Scales v. Cockrill*, 3 Head

P-
possession

15 yrs.
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possession

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title.

OVERFIELD v. CHRISTIE

7 S. & R. (Pa.) 173. 1821.

ERROR to the Court of Common Pleas of Luzerne County, in an ejectment brought by Jacob Overfield against Jerusha Christie and Hugh Osterhout, in which there was a verdict and judgment for the defendants.¹

(Tenn.) 432; *Kipp v. Synod of Toronto*, 33 U. C. Q. B. 220; *Robinson v. Osborne*, 27 Ont. L. Rep. 248; 8 Dom. L. Rep. 1014 (but see *Ryerse v. Teeter*, 44 U. C. Q. B. 8; *Simmons v. Shipman*, 15 Ont. Rep. 301; *Hamel v. Ross*, 3 Dom. L. Rep. 860); *Salter v. Clarke*, 4 N. S. W. 280; 10 Col. L. Rev. 761; 3 Harv. L. Rev. 323-326. Compare *Riopelle v. Gilman*, 23 Mich. 33.

"No privity of estate was shown, and if that was necessary, the evidence was improperly admitted. But it was not necessary. It is sufficient if there is an adverse possession *continued uninterruptedly* for fifteen years, whether by one of more persons. This was settled in *Fanning v. Willcox*, 3 Day, 258. Doubtless the possessions must be *connected* and *continuous*, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact. Such an agreement to sell and transfer of possession as were set up in this case, if proved, were sufficient." *Smith v. Chapin*, 31 Conn. 530, 531. See *Ferriday v. Grosvenor*, 86 Conn. 698.

In *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, the court said: "The general rules of law respecting successive disseisins are well settled. To make a disseisin effectual to give title under it to a second disseisor, it must appear that the latter holds the estate under the first disseisor, so that the disseisin of one may be connected with that of the other. Separate successive disseisins do not aid one another, where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate; their several consecutive possessions cannot be tacked, so as to make a continuity of disseisin, of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have been a privity of estate between the several successive disseisors. To create such privity, there must have existed, as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or deviser and devisee. In such cases, the title acquired by disseisin passes by descent, deed, or devise. But if there is no such privity, upon the determination of the possession of each disseisor, the seisin of the true owner revives and is revested, and a new distinct disseisin is made by each successive disseisor." *Doswell v. De La Lanza*, 20 How. (U. S.) 29, 32; *Robinson v. Allison*, 124 Ala. 325; *San Francisco v. Fulde*, 37 Cal. 349; *Ely v. Brown*, 183 Ill. 575; *Doe v. Brown*, 4 Ind. 143; *Schrack v. Zubler*, 34 Pa. 38; *Jackson v. Leonard*, 9 Cow. (N. Y.) 653; *Ryan v. Schwartz*, 94 Wis. 403, accord. See Georgia Annot. Code (1914), §§ 4176-4178; *Sherin v. Brackett*, 36 Minn. 152; *Vermont Marble Co. v. Eastman*, 91 Vt. 425, 452; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 507, 514; *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 28, 35.

¹ The statement of facts is abbreviated and the opinion on one point only is given.

The plaintiff gave in evidence an application in the name of Samuel Lefevre, dated the 3d April, 1769, on which a survey was made 4th October, 1773, and a patent issued to Joseph Wharton, 17th August, 1784. On the 7th June, 1813, Joseph Wharton conveyed to the plaintiff, in consideration of 122 dollars, 50 cents.

The defendants claimed under Nathan Abbott, who made a settlement and improvement in 1788. Abbott sold his improvement to Lazarus Ellis, who sold to Peter Osterhout; deceased, his son-in-law, the husband of Jerusha Christie (daughter of Ellis), one of the defendants, and father of the other defendant, Hugh Osterhout.

The defendants rested their defence on the Act of Limitations. . . . The judge's charge, which was excepted to by the plaintiff, was placed on the record, and the objections to it were now reduced to three points. . . .

3. That he ought to have charged that Nathan Abbott, having entered without title, was a trespasser, and so were all those who came after him; and consequently no continuity of possession, which is essential where one defends himself solely by the Act of Limitations.

The opinion of the Court was delivered by

TILGHMAN, C. J. . . . 3. As to privity between trespassers. If one enters and commits a trespass, and then goes off, and another comes after him, and commits a trespass, I grant that there is no privity between these persons, nor can the possession be said to be transferred and continued from one to the other.¹ But I cannot see that the present case falls within that principle. Here has been a possession of four or five and twenty years, transferred in the two first instances for a valuable consideration, and finally transferred from father to son. Each new possessor has been substantially connected with his predecessor. The law pays great regard to a possession transmitted from father to son; so great, indeed, that where there was a disseisin and a descent to the heir of the disseisor, the entry of the disseisee was at common law taken away. Lord Mansfield has told us that of *seisin* and *disseisin* very little was known in his time *but the name*. In Pennsylvania we certainly have not been in the habit of going deeply into that antiquated subject; nor is it material to inquire whether Abbott or those who came after him acquired a *seisin* according to the strict import of the term. Our law permits all persons, whether in or out of *seisin* or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt that one who enters as a trespasser, clears land, builds a house, and lives in it, acquires something which he may transfer to another; and if the possession of the two added together, amounts to twenty-one years, and was adverse to him who had the legal title, the Act of Limitations will be a bar to his re-

¹ *Pittsburgh Ry. v. Peet*, 152 Pa. 488; *Agency Co. v. Short*, 13 Ap. Cas. 793.

4-5 yr.
posn.

no seisin
necessary.

Lacking

covery. It would be extraordinary indeed if a possession acquired without force could not be transferred, when we hold that *prior possession alone is good title to recover in ejectment* against all but him who shows better title. But when possession has been continued for a number of years, and has passed from hand to hand for valuable consideration, or by descent from parent to child, it has something respectable in it. The argument of the plaintiff leads plainly to this consequence, — that the Act of Limitations can never take effect in favor of a defective title, unless one man lives twenty-one years; because every one who enters under a defective title is a trespasser, and being a trespasser, he cannot, according to the doctrine contended for, transfer his possession to another, or even transmit it by descent to his heir, so as to make a connected continued possession. If that be the case, there is little use in the Act of Limitations. But I am decidedly of opinion that the law is not so, and that it was well laid down in the charge of the Court of Common Pleas. The judgment should therefore be affirmed.

*Judgment affirmed.*¹

ERCK v. CHURCH

87 Tenn. 575. 1889.

APPEAL from Chancery Court of Shelby County. B. M. ESTES, Ch. Ejectment bill. Decree for complainant. Defendant appealed.

J. M. DICKINSON, Sp. J. Complainant filed this bill September 25, 1886, to recover possession of a parcel of land in Memphis, fronting three feet and ten inches on Lauderdale Street, and five feet seven and one-half inches on Humphries Street, being three hundred and nine feet in length.

¹ See *Ryon v. Bank*, 219 S. W. (Mo.) 652; *Haynes v. Boardman*, 119 Mass. 414; *Streeter v. Fredrickson*, 11 N. D. 300; North Dakota, Comp. Laws (1913), § 5471.

Widow in possession of land held adversely by her husband. *Robinson v. Allison*, 124 Ala. 325; *Johnson v. Johnson*, 106 Ark. 9; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Jacobs v. Williams*, 173 N. C. 276; *Doe v. Barnard*, ante, p. 80. Compare *Peoples Water Co. v. Anderson*, 170 Cal. 683; *Tuggle v. Southern Ry. Co.*, 140 Tenn. 275.

Tacking of possessions of decedent and personal representative. *Cannon v. Prude*, 181 Ala. 629; *Vanderbilt v. Chapman*, 172 N. C. 809; *East Tennessee Iron Co. v. Ferguson*, 35 S. W. (Tenn.) 900.

Tacking of oral transfers. *Oliver v. Williams*, 163 Ala. 376; *Wilhelm v. Herron*, 178 N. W. (Mich.) 769; *McNeely v. Langan*, 22 Ohio St. 32; *Vance v. Wood*, 22 Oreg. 77; *Cunningham v. Patton*, 6 Pa. 355, 357; *Illinois Steel Co. v. Paczocha*, 139 Wis. 23; see *Erck v. Church*.

In South Carolina it has been held that an heir can tack to his possession that of his ancestor. *Williams v. McAuley*, Chev. (S. C.) 200; *Epperson v. Stansill*, 64 S. C. 485; *Goings v. Mitchell*, 96 S. E. (S. C.) 612; but a purchaser cannot tack the possession of his vendor. *King v. Smith*, Rice Law (S. C.) 10.

It is admitted that complainant has a good legal title, and that he has a right to recover, unless it has been defeated by the operation of the statute of limitations.

Mackall sold and deeded to Warner a lot contiguous to the parcel in dispute, fronting fifty feet on Lauderdale Street, and the same width on Humphries Street, bounded by parallel lines. In taking possession Warner did not measure his fifty feet. Mackall, at the time Warner purchased, pointed to a group of trees, and designated one as being on the south boundary line of the lot sold. Warner fenced in his purchase, and placed his south fence along the line indicated, believing that he was inclosing the parcel purchased of Mackall and no more. He, in fact, inclosed with his fifty foot lot the parcel in dispute, and from that time continued to hold as his own the entire tract included by his fences.

Warner sold to defendant Church by deed, following the description in the deed from Mackall to him, which embraced the fifty feet, but not the parcel in dispute, and Church took possession of the whole tract as inclosed by Warner, and held it as his own.

It is admitted that Church has not held seven years, but that Warner and Church together have held more than seven years. Complainant contends that the statute of limitation has not operated for these reasons:

First. That Warner did not intend to inclose any ground but the fifty feet he purchased; that he took possession of and held the disputed parcel by mistake, and that, therefore, the statute was not set in motion because an essential requisite, namely, an intention to hold adversely, did not exist.

Second. That the periods of possession by Warner and Church cannot be connected, because they are both wrong-doers, and there is no privity between them.¹

A leading case in this State, and one frequently cited by judges and text-writers, is *Marr v. Gilliam*, 1 Cold. 491. The point, actually decided, was that the possession of one who had entered lawfully upon land by deed as a tenant in common, but who subsequently began to hold adversely to the other tenants in common, might be connected with that of his heirs so as to make out the period of the statute, because there is a privity of estate between ancestor and heir, but that the wife of such first possessor could not connect her possession with his because there was no such privity between husband and wife. Judge Wright (page 504) thus states the law, "Separate successive disseizins do not aid one another, where several persons successively enter on land as disseizors, with-

¹ The opinion of the court on the first question is omitted. It followed *French v. Pearce*, 8 Conn. 49. Only a portion of the opinion on the second question is given.

out any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate. Their several consecutive possessions cannot be tacked, so as to make a continuity of disseizins of sufficient length of time to bar the true owners of their right of entry."

On pages 509-10 Judge Wright discusses the cases of *Wallace v. Hannum*, 1 Hum. 443; *Norris v. Ellis*, 7 Hum. 463, and *Crutinger v. Catron*, 10 Hum. 24, and criticises as *dicta* the statements in those opinions, that a trespasser by mere possession, without color of titles, acquires no right that is either alienable or descendible. As previously stated, Judge Nicholson, in *Baker v. Hale*, 6 Baxt. 48, says: "It is settled by repeated adjudications in this State that the successive possessions of trespassers cannot be so connected as to make up the bar of seven years under the second section of the Act of 1819, and for the reason that there can be no privity between wrong-doers." In this case he reviews *Marr v. Gilliam*. On page 51 he apparently approves the statement of the law as made by Judge Wright, to the effect that successive possessions of trespassers may be tacked together where the successive possessors hold the land as their own, and there is a privity of estate between them. On the next page, however, he says that the possessory right of a naked trespasser is not descendible or alienable. This is clearly in conflict with the position of Judge Wright. In neither case, however, was the law, as stated, called for. Thus we have conflicting declarations of the law from eminent judges, but none of them are stamped with the authority of an adjudged case.

In Wait's Action and Defences the following is stated to be the law: "When there are several successive adverse occupants of real property, the last one may tack the possession of his predecessor to his so as to make a continuous adverse possession for the time required by the statute, provided there is a privity of possession between such occupants; and in case of an actual adverse possession, such privity arises from a parol bargain and sale of the possession of the premises followed by delivery thereof, as well as by a formal conveyance from one occupant to the other." Vol. 6, p. 455, and the cases there cited.

In *Weber v. Anderson*, 73 Ill. 439, the facts presented a case involving almost every essential element embodied in the case under consideration. The instruction in the lower court to the jury was that the rights acquired by the first possessor could not be transmitted except by deed. The case was reversed, the superior court saying that there was "parol proof" showing the Plank Road Company transferred "their possessions over to him" (the defendant). It was held that parol proof was sufficient to show the transfer of possession, and that it could be tacked to the subsequent holding. It does not clearly appear in that case whether or not there was an actual transfer of a possessory right by parol. The language of the

Court would admit of this construction. If, however, the possession merely passed as in the case under consideration, *sub silentio*, without any knowledge by either party that there was such a possessory right, and that it was being transferred, then the case is an extreme one.

The opposite conclusion was reached under a similar state of facts by the Supreme Court of Wisconsin in *Graeven v. Davies*, 31 N. W. R. 914.

In *Fanning v. Wilcox*, 3 Day (Conn.), 258, the rule (as quoted by Wood on Limitations, p. 582, note) is thus stated:¹ "Doubtless the possessions must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact."

This is in substantial accord with the doctrine as stated by Judge Wright in *Marr v. Gilliam*, which is approved by us. There must be a privity of estate connecting the successive possessions, and a transfer of the possessory right, by grant, inheritance, devise, or contract, verbal or written. The mere fact of successive possessions appearing, and nothing more, will not constitute such privity. If the contrary rule were adopted, then any independent trespasser entering upon land simultaneously with the abandonment of it by a prior trespasser could connect the two possessions, without any pretence of a privity of estate, by merely showing that there had been no actual *hiatus* between the possessions.

The deed to Church does not embrace the land in dispute, and there is no evidence that Warner undertook to transfer to Church his possessory right to it. On the contrary, it is shown that he was ignorant of having such right. There is no privity of estate between them in respect to this land. Warner both acquired and abandoned his possessory right in ignorance of its existence. The entry by Church was a new disseizin, and a new period of limitation began.

The decree of the Chancellor is affirmed.²

¹ This quotation is not from *Fanning v. Willcox*, but from *Smith v. Chapin*, 31 Conn. 530, 531, *ante*, p. 84 note.

² *Messer v. Hibernia Soc.*, 149 Cal. 122; *Evans v. Welch*, 19 Colo. 355, *accord*. Compare *Sheldon v. Michigan Central R. R. Co.*, 161 Mich. 503; *Gildea v. Warren*, 173 Mich. 28; *Lake Shore Ry. Co. v. Sterling*, 189 Mich. 366; *Robertson v. Boylon*, 181 N. W. (Mich.) 989; *Moore v. Helvey*, 235 Mo. 443; *Rembert v. Edmondson*, 99 Tenn. 15; *Ferguson v. Prince*, 136 Tenn. 543, 554-558.

Contra, *St. Louis S. W. Ry. Co. v. Mulkey*, 100 Ark. 71; *Rich v. Naffziger*, 255 Ill. 98; *Wishart v. McKnight*, 178 Mass. 356; *Crowder v. Neal*, 100 Miss. 730; *Belotti v. Bickhardt*, 228 N. Y. 296; *Naher v. Farmer*, 60 Wash. 600; *Clithero v. Fenner*, 122 Wis. 356. See *Viking Co. v. Crawford*, 84 Kan. 203; 29 Harv. L. Rev. 790.

F. *Disabilities.*

GRISWOLD v. BUTLER ✓

3 Conn. 227. 1820.

BRISTOL, J.¹ . . . Let it, then, be assumed, that Hezekiah Griswold was disseised in 1793; that he was *then non compos mentis*, and so continued till his death in 1802; that Mercy Weller, on whom the descent was cast, was also *non compos mentis*, and so continued until her death in 1817; and that this action was brought, by Elijah Griswold, her heir, within five years after her death; the plaintiff is still barred of a recovery. To raise this question we must assume the fact, that Hezekiah Griswold was disseised in 1792; and that the possession of the defendant and others, since that time, has been adverse to the title of Hezekiah Griswold and his heirs; for if the possession has not been adverse, but held under Hezekiah Griswold, without any claim or title in the occupants, no possession, however long, will acquire a title.

It has been urged, that the disability of Hezekiah Griswold and his heir was *one continued disability*; that the circumstance of Hezekiah Griswold's death makes no difference; but the case stands on the same ground as if Hezekiah Griswold had lived until 1817, when his heir would have an undoubted right of entry for five years; that the case does not compare with one where there occur two different disabilities in the same person, which cannot be tacked; but that this is the farthest to which any adjudged case has extended; that the statute was intended to punish the negligent owner, by a forfeiture of his title, and it would be an extremely harsh construction to apply the statute in a case, where, during the whole time of the disseisin, the true owners had never been competent for a single moment, to assert their title.

In reply to this reasoning, let it be remarked, that the question depends on the *true meaning* of the statute; and the best mode of ascertaining that meaning, is, to examine the language made use of, and derive the meaning from the language, instead of arbitrarily fixing that meaning, in the first place, and then endeavoring so to *construe* the language as to make it conform to the standard previously set up. It is unfortunate that certain phraseology, in frequent use on this subject, was ever adopted; such as, "that the statute never operates, where there has been no *laches*," that "it never runs against persons who are under a disability;" &c., &c. This language, without conveying any definite ideas, had nearly frittered away a most useful statute, until Judge Smith, in the case of *Bush*

¹ The statement of facts is omitted, and only a portion of the opinion of one of the judges is given.

v. *Bradley*, 4 Day, 298, instead of adopting this legal jargon, recalled our attention to the language of the act, and endeavored to ascertain its meaning, not by attributing certain motives to the legislature, and then twisting the language so as to make it conform, but by learning the meaning and intention of the legislature from the language made use of; which is the only safe mode of determining what the legislature intended. The accuracy of this language is also denied, by Judge Swift, in the case of *Bunce & al. v. Wolcott*, 2 Conn. Rep. 27. "Nor," says he "is the proposition correct, that the statute never begins to run, against a person under a disability. Suppose that the party claiming is an infant, when the title accrues; if fifteen years run during his infancy, he has but five years, after he comes of full age, to make his entry. This clearly shows, that the statute operates against him during the disability. Indeed, the statute always begins to run against a man, the moment he is disseised, whether he is under a disability, or not."

We may now take it for granted, in conformity to the language of the statute, and the unanimous opinion of the court of errors, in the case of *Bunce & al. v. Wolcott*, that the statute began to run, the moment Hezekiah Griswold was disseised, whether under disability, or not; and more than fifteen years having elapsed since that disseisin, the rights of his heirs are lost, unless those rights are saved by the proviso: for it is too clear to admit of argument, that, had the statute contained *no proviso*, the interest of all persons whether under disability, or not, would be destroyed, by an adverse possession of fifteen years.

Does the proviso, then, save the right of the present plaintiff, and permit him to assert it, at any time, within five years, not from the death of Hezekiah Griswold, to whom the right of entry first accrued, but from the death of Mercy Weller? If the present plaintiff can enter within five years, after *her* death, if *he* should be under a disability during his life, *his heirs* will have the same right to enter within five years from *his* death; and so different successive disabilities might be extended to an indefinite period. Such was not the intention of the legislature. The saving of the statute relates solely to disabilities existing at the time when the right of entry first accrued. *Bush & al. v. Bradley*, 4 Day 298. *Bunce & al. v. Wolcott*, 2 Conn. Rep. 27. *Stowel v. Lord Zouch*, 1 Plowd, 353. *Doed. George & al. v. Jesson*, 6 East 80. *Eager & ux. v. The Commonwealth*, 4 Mass. Rep. 182. It does not provide a remedy for subsequent disabilities, even in the person to whom the right of entry does first accrue. For if an infant of the age of six years is disseised, and before arriving at full age, marries, and continues under coverture, without asserting her title, more than five years after she attains to full age, her title is barred; and if, instead of marrying, she had been visited with insanity, before she arrived at full age, and continued insane, during the whole five years after, her title

would be also lost; for we have seen, that whether a supervenient disability be voluntary or involuntary, makes no difference; and the reason is, that no disability is provided for, or saved, except *the same disability*, which existed when the right of entry *first* accrued. And an entry must be made within five years after *that* disability ceases to exist, whether any other disability has been superadded or not, provided more than fifteen years have elapsed from the time of the disseisin.

The saving of the statute, therefore, relates to the disability of Hezekiah Griswold, to whom the right of entry first accrued. Had his disability been removed, during his life, and he become of sound mind, he must have entered within five years, to protect himself from the operation of the statute.

Must not his heirs enter within five years from his death, in the same manner, that he must have entered within five years after the removal of his disability? And this, whether the heirs are under disability, or not?

The fourth section of the statute in question, after providing a saving for the disabilities existing when the title accrues, proceeds to *annex a limitation* to the rights saved, and to prescribe the time *within which*, and *by whom*, those rights shall be exercised. "So as such person or persons, or his or their heirs, shall, within five years next after his or their full age, discoverture, or coming of sound mind, enlargement out of prison, or coming into this country of New-England, or territory of New-York, *or death*, take benefit of, and sue forth the same, and at no time after the said five years:" That is to say, "take benefit" of an entry, or "sue forth" an action to recover the land.

This language is susceptible of one construction, and one only, when taken in connection with the other parts of the statute. It is this: that such person or persons, who were owners of the land, at the time the right of entry first accrued, or at the time of the disseisin, if then laboring under the disability of *infancy*, should have five years, after he or they become of full age; if under coverture, should have five years from the time they become discovert; if beyond seas, should have five years after their return; and if *non compos mentis*, should have five years after they became of sound mind; but as these disabilities might *never* be removed, but continue until *death*; that the *heirs* of such disabled persons, who died under the same disability which existed when their title accrued, should also have five years from the death of the disabled ancestor, to make their entry, or bring their action to recover the land. There is no saving for any disability in the *heirs* of the person to whom the right of entry first accrues, any more, than for supervenient disabilities in the same person; but the clause in question constitutes as absolute a bar to the heirs of a disabled person, who do not enter within five years after his death, as fifteen years adverse possession would be

to every person, whether under disability or not, had the statute contained no proviso. It is true, that upon this construction of the statute, the person first disseised may labor under a disability, and die leaving heirs under similar disabilities; and a good title be lost, without *laches* in the owners. So, if an infant is disseised, and marries under twenty-one years of age, and continues under coverture more than five years, after attaining her full age, without asserting her rights, her title is lost, and that without *laches*; but if marrying under twenty-one, is to be accounted her own folly (though her minority must protect her from this imputation) if at the age of twenty she becomes *non compos*, and does not bring her action, or make her entry, within five years after she is of full age, she is also barred; and that without any imputation of *laches* or folly. Where, then, is the distinction between the hardship of the present case, and that which existed in the case of *Bunce v. Wolcott*, and many other cases? The necessity of protecting long and peaceable possession of land is much more urgent, than any considerations resulting from the pretended hardship of the rule: and if this rule is not adopted, but the saving of the statute, instead of being confined to disabilities existing at the time of the disseisin, is to be extended to successive disabilities in the heirs of the person first disseised, there is no telling to how long a period they may extend, or how much evil such a construction would entail on the community. Every reason, which can be urged against admitting supervenient disabilities in the same person, to protect his title, equally applies to the present case; for although some supervenient disabilities may be voluntary, and others not so; yet, as I have already remarked, the distinction between them is exploded.

There is no substantial difference between the case of *Bunce v. Wolcott*, before cited, and the present. In that case, the court decided, that the saving of the statute applied only to such disabilities as existed at the time when the right of entry first accrued; which, they said, was as the time when the owner was first disseised, and not to any supervenient disabilities; and although a disability in the heir of a person disabled, is not properly a supervenient disability, yet it falls within the same reason; and what is more conclusive, the statute declares, that if the person first disseised is under a disability, and dies before it is removed, his heirs shall have five years from his death to make their entry; and if they suffer this time to pass, they are barred, whether under a disability or not.¹

¹ Compare *Dewey v. Sewanee Co.*, 191 F. R. 450.

The statutes of limitation ordinarily do not enlarge the period within which the true owner may make entry or bring action except on account of disabilities affecting the owner at the time his right first accrued. *Allis v. Moore*, 2 All. (Mass.) 306.

This is true even though the owner has passed under a second disability before being freed from the first. *Mercer v. Selden*, 1 How. (U. S.) 37;

Bunce v. Wolcott, 2 Conn. 27; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129.

The rights of heirs of the owner are not enlarged on account of any disabilities affecting them. *Fleming v. Griswold*, 3 Hill (N. Y.) 85; *Seawell v. Bunch*, 6 Jones (N. C.) 195. *Contra*, *Rose v. Daniel*, 3 Brev. (S. C.) 438.

This is true even though their ancestor was under a disability at the time his right first accrued. *Thorp v. Raymond*, 16 How. (U. S.) 247; *Griswold v. Butler*, *supra*.

Some statutes expressly limit the period during which the true owner may take advantage of a disability. California, Code Civ. Proc. (1915), § 328; Kentucky, Stats. (1915), § 2508; Missouri, Rev. Stats. (1919), § 1307.

SECTION II.

PRESCRIPTION.

NOTE.—Several of the earlier cases on Prescription are reported only in Serjeant Williams's note to *Yard v. Ford*, 2 Wm. Saund. 172, 175, as follows: "In *Lewis v. Price*, Worcester Spring Assizes, 1761, which was an action on the case for stopping and obstructing the plaintiff's lights, WILMOT, J., said, that where a house has been built forty years, and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties; and he said that twenty years is sufficient to give a man a title in ejectment, on which he may recover the house itself; and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house. So in an action on the case for stopping up ancient lights, the defendant attempted to show that the lights did not exist more than sixty years; WILMOT, C. J., said, that if a man has been in possession of a house with lights, belonging to it for fifty or sixty years, no man can stop up those lights: possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right, the highest writ in the law. If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd. But the action can only be maintained for damages so far as the lights originally extended, and not for an increase of light by enlarging the windows recently; and I should think a much shorter time than sixty years might be sufficient; but here there has been a possession of that time. *Dougal v. Wilson*, Sittings C. B. Trin. 9 Geo. 3. So in an action on the case for obstructing a way, the plaintiff proved that F. was seised of the plaintiff's tenement and the defendant's close, and in 1753, conveyed the tenement to the plaintiff with all ways therewith used, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from F. for three lives made in 1723, by which F. demised the field in question in as ample a manner as one R. a former tenant held it, and in the lease there was no exception of a way over the close. YATES, J., held that by the lease without any reservation the way was gone, and therefore could not pass under the words *all ways*; but as thirty years had intervened between the defendant's lease and the plaintiff's conveyance, and the way had been used all the time, that was sufficient to afford a presumption of a grant or license from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass. Bull. Nis. Pri. 74, *Keymer v. Summers*. If trespass be brought against a person for using a way under similar circumstances, as he cannot prescribe for the way, he must justify under a non-existing grant, and so excuse a *profert*. As where in trespass *quare clausum fregit* in B., the defendant justified under a grant of a right of way over B. by a deed lost by time and accident; and on issue joined on a traverse of the grant, it appeared in evidence that the way had been used *adversely*, and not by leave and favor, for twenty years and more, over the close B. Which adverse user of the way for so long a period, the learned judge at the trial thought sufficient to leave to the jury to presume a grant; and the Court of K. B. on a motion for a new trial confirmed his opinion. 3 East, 294. *Campbell v. Wilson*. This is a strong case: for the

grant must be presumed to have been made within twenty-six years, because at that time all former ways had been extinguished by the operation of an inclosure act. So in an action on the case for obstructing the plaintiff's lights, who proved an uninterrupted possession of them for twenty-five years past: GOULD, J., who tried the cause, then called upon the defendant to show if he could answer this, because, if unanswered he thought it sufficient to establish the plaintiff's case. The defendant upon this offered a grant from the former owner of the defendant's premises to the plaintiff's predecessor, dated June, 1750, by which he granted him liberty to put out a particular window, and argued that having this grant and no other, it must be presumed that the plaintiff never had any other, and this would be an answer to the presumption arising from length of possession. The judge thought the grant would not alter the case, as it related to a particular window, which was not included in the present action, and no exception of any other, or reference was mentioned in the grant. The defendant then relied on the possession previous to these twenty-five years; but the judge said that would not avail them; he thought twenty years' possession unanswered was sufficient, and if the defendant had any evidence to explain the possession within twenty years, to show it was limited, or modified, or bad in its commencement, that would be material; the defendant offered none such, and there was a verdict for the plaintiff; the judge however reserved the point of law if the defendant thought fit to move the court. Afterwards a rule to show cause why there should not be a new trial was obtained on the ground of a misdirection; because the judge told the jury that so long an enjoyment was sufficient to give the plaintiff a right to them, although the defendant offered to prove that there were no lights there previous to that time; but that this evidence was not received: and the counsel for the rule insisted that the judge had called the twenty-five years' possession an absolute bar, incapable of being overturned by any contrary proof, where it was only a presumptive proof which might be explained away; that it was a matter of fact for the jury, but the judge left nothing to the jury, treating it as a matter of law. LORD MANSFIELD. I think there must be some mistake in the statement of what passed at the trial. The enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar*, like a Statute of Limitation; it is certainly a *presumptive bar* which ought to go to a jury. Thus in the case of a bond, there is no Statute of Limitations that bars an action upon it, but there is a time when a jury may presume the debt to be discharged, as if no interest appear to have been paid for sixteen or twenty years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence; for so it was held in the case of the *Mayor of Kingston upon Hull v. Horner*, Cowp. 102. In a case before me at Maidstone, I held length of time, when unanswered and unexplained, to be a bar. WILLES, J. There was a case before me at York where I held uninterrupted possession of a pew for twenty years to be presumptive evidence merely, and that opinion was afterwards confirmed in the Court of Common Pleas. ASHHURST, J. I should have thought it was the duty of the counsel for the defendant to have told the judge that this evidence was only a presumptive, not an absolute bar; (to which it was answered by Coke, of counsel for the defendant, that it was so and a case was cited where forty years were held not to be an absolute bar.) BULMER, J. I incline very much to think that the judge was misunderstood, for he could never call it an absolute bar. In the *Wells Harbor Case* this court went fully into the doctrine, and the rule of law is clear, that length of time is presumptive evidence only. The judge said, 'I think twenty years' uninterrupted possession of these windows, is a sufficient *right* for the plaintiff's enjoyment of them.' Now that expression is open to a double construction. If the judge meant it was an abso-

lute bar, he was certainly wrong; if only as a presumptive bar, he was right. The court seemed much inclined to discharge the rule, but the counsel for the defendant pressing it much, it was made absolute. However, the next day BULLER, J., said that ASHHURST, J., had waited on MR. JUSTICE GOULD who said he never had an idea but it was a question for a jury; and would have left it to the jury, if the counsel for the defendant had asked it; that he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion. *Rule discharged. Darwin v. Upton*, Mich. 26 Geo. 3, K. B."

"In an action on the case, *Stansell v. Jollard*, B. R. Trin. 43 Geo., III. M.S., *Lawrence, J.*, for digging so near the gable-end of the house of the plaintiff, let to a tenant, that it fell; LORD ELLENBOROUGH held, that where, as in the case before the court, a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or as it were of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support; but that it was otherwise of a house, &c., newly built." — 1 Selw. N. P. (11th ed.) 457.

"I take it that twenty years' exclusive enjoyment of a water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament." — *Per* LORD ELLENBOROUGH, C. J., in *Bealey v. Shaw*, 6 East, 208, 215 (1805). He repeated the remark in *Balston v. Bensted*, 1 Camp. 463, 465 (1808).

"If the plaintiff has enjoyed the support of the land of the defendant for twenty years to keep up his house, and both parties knew of that support, the plaintiff had a right to it as an easement, and the defendant could not withdraw that support without being liable in damages for any injury that might accrue to the plaintiff thereby." — *Per* PARKE, B., *Hide v. Thornborough*, 2 C. & K. 250, 255 (1846).

ANGUS v. DALTON¹

3 Q. B. D. 85; 4 Q. B. D. 162; 6 Ap. Cas. 740. 1877. 1878. 1881.

CLAIM by Angus & Company, coach-builders, against Dalton and the Commissioners of her Majesty's Works and Public Buildings, for injury to the plaintiffs' factory at Newcastle-upon-Tyne.

At the trial, before *Lush, J.*, in 1876, the judge directed a verdict for the plaintiffs for the amount claimed, subject to a reference to ascertain the damages, and extended the time to enable the plaintiffs

¹ This action was tried in 1876 before *Lush, J.*, who directed a verdict for the plaintiffs. The Queen's Bench Division (*Cockburn, C. J.*, and *Mellor, J.*; *Lush, J.*, dissenting) in 1877 ordered judgment to be entered for the defendants. The Court of Appeal (*Cotton* and *Thesiger, L. JJ.*; *Brett, L. J.*, dissenting) in 1878 reversed this judgment and ordered that the defendants should elect within fourteen days whether they would take a new trial, and if they did not so elect that judgment should be entered for the plaintiffs for the amount of the damages assessed by the special referee. The case was argued in the House of Lords in 1879, and again in the presence of seven of the judges in 1880. Three of the judges, *Lindley, Lopes*, and *Bowen, JJ.*, were of the opinion that the judgment of the Court of Appeal should be affirmed, and four, *Pollock, B.*, *Field, Manisty*, and *Fry, JJ.*, were of the

to move for judgment. In April, 1877, the plaintiffs moved accordingly.

¹ The plaintiffs are owners in fee of a coach factory at Newcastle-upon-Tyne. The defendant Dalton is a builder, who had been employed by the Commissioners of Works and Buildings, under a contract to take down a house adjoining to the plaintiffs' factory, and to erect in its stead a building to be used as a Probate office.

The action is brought for excavating the soil of the adjoining property, on which the Probate office was to be built, to such a depth as left the foundation of that part of the coach factory without sufficient lateral support, and thereby causing the factory to fall.

The two houses were apparently built at the same time, and were estimated to be upwards of a hundred years old. They were divided by a wall which belonged to the house pulled down, and which wall had been taken down by the defendants without injury to the factory.

Up to the year 1849, being about twenty-seven years before the accident, both houses had been occupied as dwelling-houses; but in that year the plaintiffs' predecessor converted his house into a coach factory, and to adapt it to this purpose he removed the internal walls, and erected on his own soil close to and in contact with so much of the dividing wall, a large stack of brickwork serving the twofold purpose of a chimney stack, and also of a support to the main girders which had to be put in to sustain the floors. These girders were inserted into the stack on the one side, and into the plaintiffs' wall on the opposite side, and were strongly secured with braces and struts, and they thus formed the main support of the upper stories of the factory. When the defendants removed the dividing wall they left this stack untouched, and erected on the site of the dividing wall a temporary wooden gable so as to protect the factory while the new building was in progress. There had been no cellarage in the adjoining house, and it was not disputed that if none had been made,

opinion that judgment should be entered for the plaintiffs without leave to defendants, to move for a new trial. The law lords, *Lord Selborne*, L. C., *Lord Penzance*, *Lord Blackburn*, *Lord Watson*, and *Lord Coleridge*, C. J., were all of the opinion that, the defendants not having elected to take a new trial within the time allotted to them, judgment should stand for the plaintiffs. Accordingly judgment of the Court of Appeal was affirmed. All the courts and judges were of the opinion that the Commissioners were liable for the act of Dalton in accordance with *Bower v. Peate*, 1 Q. B. D. 321. All of the judges and law lords—except *Lord Coleridge* and *Mellor* and *Lopes*, JJ., who contented themselves with expressing their agreement with some one or more of the opinions that were read—gave judgments of their own, most of them very elaborate.

The opinions given here are abbreviated and in part summarized. The opinions of *Cotton* and *Brett*, L. JJ., in the Court of Appeal, and all the opinions in the House of Lords are omitted.

¹ In no one of the reports are either the facts or the arguments given. The statement of facts here printed is taken from the opinion of *Lush*, J., 3 Q. B. D. 85, 87.

the stack and the factory would not have been affected by the alterations.

The defendants, however, having removed the dividing wall and erected the temporary gable, proceeded to dig to the depth of several feet below the level of the foundation of the plaintiffs' stack, leaving a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall. This pillar, however, large as it was, proved to be insufficient. After exposure to the air, and before the foundations of the new wall had been completed, it gave way, and the stack sunk and fell, drawing after it the entire factory.

Under these circumstances, it was contended, on behalf of the defendants, first, that the plaintiffs' factory was not entitled to the support of the adjacent soil; and, secondly, that at all events the Commissioners of Works and Buildings were not responsible for the negligence of the contractor in not leaving sufficient support or not properly shoring up the chimney stack.

These points were reserved at the trial, which took place before *Lush, J.*, at Newcastle at the Summer Assizes, 1876, and a verdict was entered for the plaintiffs, subject to the questions of law and to a reference to an arbitrator to assess the damages, in case the verdict should stand against both or either of the defendants.

[*LUSH, J.*, was of opinion that the building "had acquired the status of an ancient building" (page 100), and that the plaintiffs were entitled to hold their verdict. In the course of his opinion he said:—]

I conclude, therefor, that the mere absence of assent, or even the express dissent, of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, and that nothing short of an agreement, either express, or to be implied from payment or other acknowledgment, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption. In other words, that it would be presumed after the lapse of twenty years that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance [page 93] . . .

The law of lights having been settled by the Prescription Act, any argument drawn from the Limitation Act applies only to such an easement as the one in question, which was left untouched by the Prescription Act. It seems to me to be the necessary consequence of the Limitation Act, that such an easement should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence,—that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped

ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded, in view of the necessary effect of the Limitation Act upon such an easement as this.

It is not, however, necessary in this case to base my judgment on this ground. If the right to support still rests on the doctrine of presumption, no facts are shown which in my opinion are admissible to rebut it, for nothing is shown except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory; and this, for the reasons already given, cannot, in my opinion, be held to constitute rebutting evidence. If notice to the adjoining owner that an additional burden has been cast upon his land be an ingredient, that is disposed of by the fact that the conversion of the dwelling-house into a factory, and the use of the premises as a factory during twenty-seven years, were things open and notorious.

There are here, then, all the elements which go to make up the ordinary presumption, unmixed with any rebutting element. If such a length of enjoyment under such circumstances does not create a right to support from the adjacent soil, then no building the date of whose origin can be proved can claim it. For the common law does not present any alternative to the time of legal memory, except twenty years' enjoyment. This would be an alarming doctrine, especially at the present day, when a very small proportion of the owners of houses now standing could rest their title to support upon immemorial enjoyment [pages 94, 95].

[COCKBURN, C. J., was of opinion that the defendants had acquired no easement of support; he said: —]

That the right to the lateral support of the adjacent soil for a building which has been superadded to the soil is an easement, as distinguished from the proprietary right to such support for the soil itself in its natural condition, is undoubted. Equally certain is it that, except where the positive law steps in, and, in the absence of any legal origin, gives to a fixed period of possession or enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant. Upon both these points the authorities are uniform and positive. It is no doubt equally true that, in the absence of proof of any grant, the existence of a lost grant may be presumed from length of enjoyment. And in no system of jurisprudence has this doctrine been carried to greater lengths than in our own. In the absence of any sufficient law regulating the period of prescription, judges, to make up for this deficiency, were in the habit of directing juries to presume grants, in the past or possible existence of which no one believed, — a practice to be deprecated, and, in spite of precedent, to be followed with great reserve, and certainly with no disposition to extend it.

Looking to the importance of the question here involved, and to the fact that the law as to lateral support, not having hitherto been brought before a court in banc, has not been made the subject of authoritative decision, it may be useful to trace the growth of this doctrine as to presumption and the extent to which it has been carried, and for this purpose to review the authorities on the law of prescriptive easements.

At the common law there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, "the memory of man ran not to the contrary." But by several Statutes, fixed periods were limited for the bringing of actions for the recovery of real estate. Prior to the Statute of Merton, Bracton tells us that the limitation in a writ of right was from the time of Henry I., that is to say, from the year 1100, or 135 years. L. 2, f. 179.

By the Statute of Merton (20 Hen. 3, c. 8) the limitation in a writ of right was from the time of Henry II., — a period of seventy years. Writs of *mort d'ancestor*, and of entry, were not to pass the last return of King John from Ireland, — a period of twenty-five years. Writs of novel disseisin were not to pass the first voyage of the king into Gascony, — a period of fifteen years.

New periods of limitation were fixed by the Statute of Westminster, 3 Edw. 1, c. 39 (1275). By this Statute the time for bringing a writ of right was limited to the time of King Richard I., — a period of eighty-eight years. Writs of *mort d'ancestor*, of cosinage, of aiel, and of entry, were limited to the coronation of Henry III., — about fifty-eight years. The writ of novel disseisin was to remain limited as before, namely, to the passage of Henry into Gascony.

It is plain that this Statute had reference to actions for the recovery of real estate. Nevertheless the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule as to prescription established by the Statute to incorporeal hereditaments, and, among others, to easements.

As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But, here again, the legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory; that is to say, from the time of Richard I. This convenient rule having been established, the judges seem not to have thought it worth while, when the Statute of 31 Hen. 8, c. 2, was passed, by which in a writ of right the time was limited to sixty years, to apply, by an analogous

use of that Statute, the time of prescription established by it to actions involving rights to incorporeal hereditaments.

In a case of *Bury v. Pope*, Cro. Eliz. 118, in an action for stopping lights, according to the report, "It was agreed by all the justices that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and the house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other things against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land; and it was adjudged accordingly."

And as late as 1 Car. 2, it was held in a case of *Sury v. Piggott*, Poph. 166, that to maintain an action for obstructing lights, the light must be prescribed for as having been enjoyed time out of mind.

But the Statute of Jac. 1, c. 21, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change in the law by the arbitrary adoption of that period by the courts as sufficient to found the presumption of the existence of a right from the time of legal memory. Here, again, the boldness of judicial decision stepped in to make up for defects in the law which the supineness of the legislature left uncared for. But it is to be observed, and the observation is specially important to the present purpose, that with all their desire to reduce the period of prescription within reasonable limits, the courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory. Hence, if in the course of a cause it appeared that the disputed right had had a later origin, the presumption failed, and the claim of right was defeated.

The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming after long user a grant by a deed which in the lapse of time had been lost. At first, to raise this presumption it was required that the user should be carried back as far as living memory would go; but after the Statute of James, user for twenty years was — here again, without any warrant of legislative authority, and by the arbitrary ruling of the judges — held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. Well might Sir W. D. Evans, while admitting the utility of this doctrine, say that its introduction was "a perversion of legal principles and an unwarrantable assumption of authority." 2 Ev. Poth. 139.

Thus the law remained till the Act of 2 & 3 Wm. 4, c. 71, was passed, with a view of putting an end to the scandal on the adminis-

tration of justice which arose from thus forcing the consciences of juries. How far it has affected this purpose will be seen further on.

But this doctrine of presumption from user or enjoyment under the former law could not, according to the highest authorities, be carried, as regarded the presumption of a lost grant, any more than that which had reference to the existence of an easement beyond time of legal memory, further than that of a presumption capable of being rebutted, and so destroyed [pages 102-106] . . .

I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances there is no form of easement in which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than in the easement of lateral support. For this easement is obviously one of a very anomalous character. In every other form of easement the party whose right as owner is prejudicially affected by the user has the means of resisting it if illegally exercised. In the case of the so-called "affirmative" easements he can bring his action, or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach the more nearly to this, — that of light, — the supposed analogy entirely fails. For although no action can be brought against a neighboring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question the adjoining owner has no remedy or means of resistance, — unless, indeed, he should excavate in his own immediately adjacent soil while the neighboring house is being built or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house. Is he to endanger and per-

haps destroy his own house by excavating under it for the purpose of preventing his neighbor from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity of the owner's soil a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right.

For these reasons I cannot entertain a doubt that — at all events as the law stood before the passing of the Prescription Act, 2 & 3 Wm. 4, c. 71 — the presumption of a grant, if any, arising in this case from the support to the plaintiffs' premises having been had for the twenty-seven years, was open to be rebutted; and that when it was proved — or, what is the same thing, admitted — that when the plaintiffs' premises were rebuilt — the original easement, if any, being, as I have already pointed out, gone — the assent of the defendants' predecessors was not asked for or obtained by grant, or in any other way, to any support being derived from their soil, the presumption was at an end [pages 116–118].

[MELLOR, J., admitted "that the case is not free from great difficulties," (page 130), but entirely agreed with the Chief Justice.]

The defendants had judgment.

An appeal was taken to the Court of Appeal (4 Q. B. D. 162), and argued in May, 1878, before BRETT, COTTON, and THESIGER, L. JJ., by

THESIGER, L. J. [after pointing out that the right to lateral support of buildings from soil occupied an intermediate place between the right to the support of soil from soil and the right to the support of building from building, and that it was not a right of property, continued thus:—]

If, then, the right claimed be not a right of property, is it an easement which can be acquired; and if it can, how and under what circumstances may it be acquired? That it is a right or easement, which may under some circumstances be acquired, is treated as clear law by a long series of authorities, and is admitted by all the judgments in the court below; that it is an easement not coming within the Prescription Act appears also to be generally admitted, and is assumed by me; that it is a right or easement, which must be founded upon "prescription or grant express or implied," is a proposition stated in terms already quoted in the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse*, E. B. & E. 646, at page 655; and borne out by the general current of authority upon the sub-

ject of the acquisition of easements. I cannot therefore accede to the view suggested by Lush, J., in the court below, that an absolute right to an easement uninterruptedly enjoyed for twenty years may be obtained by analogy to the period of limitation fixed as regards entry on lands by 21 Jac. 1 c. 16. It may be that the commencement of the reign of Richard I. was originally fixed as the period of prescription for incorporeal rights by analogy to the Statute 3 Edw. 1, c. 39, which fixed the same period for alleging seisin in a real action, and there are *dicta* to be found in the books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But as a matter of practical law, this analogy does not appear to have been extended by the courts to these last-mentioned Statutes. The reign of Richard I. still remained the time to which legal memory in regard to easements was supposed to relate, and although the later Statute of 21 Jac. 1, c. 16, did undoubtedly suggest to the minds of the judges the propriety of giving to twenty years' uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the Statute by analogy, notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the Statute of Edward I. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, although I must add that it has had in my opinion in many respects a beneficial operation, and is after all but an extension of the fiction which had previously formed the basis of prescriptive titles; for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late to question the validity of its introduction. The doctrine of lost grants forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent which has been sanctioned by established authority. It becomes necessary, therefore, in the first place, to consider the character and extent of the presumption of a lost grant as applicable to easements generally, and then, in the second place, to see in what respects, if any, a difference exists in regard to the particular easement claimed in this action.

And first, as regards easements generally, the authorities cited in the court below establish that this presumption is not a *presumptio juris et de jure*, or, to use other language, is not an absolute and conclusive bar. On the other hand, these same authorities lay down

that the uninterrupted enjoyment of an easement for twenty years raises, to use the words of Lord Mansfield, in *Darwin v. Upton*, 2 Wms.'s Notes to Saund. 506, "such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it;" and the corollary upon this proposition is stated by Bayley, J., in *Cross v. Lewis*, 2 B. & C. 686, where he says: "I do not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin v. Upton* it has been held that in the absence of any evidence to rebut the presumption, a jury should be told to act upon it." What, then, is the nature of the evidence which would be held to "contradict," "explain," or "rebut" this decisive presumption? Proof of the mere origin of the easement within the period of legal memory is not sufficient for this purpose; it was to meet the hardship which arose from such proof preventing the acquisition of a prescriptive title that the legal fiction of a grant made and lost in modern times was invented; neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment. See *Cross v. Lewis*, 2 B. & C. 686, at page 689, where Bayley, J., speaking of the case of opening windows, says: "If his neighbor objects to them, he may put up an obstruction; but that is his only remedy, and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them." Again, proof that the dominant and servient tenement were originally in one ownership, and were separated under such circumstances as to negative the presumption of any reservation or grant of the easement claimed having actually been made at the time of the separation, would not be sufficient to prevent the presumption arising in a case where the enjoyment has been uninterrupted for twenty years; see *Livett v. Wilson*, 3 Bing. 115, where, although it was proved that the two tenements were separated by a deed containing no grant or reservation of the easement claimed, the court did not rely upon this fact as supporting the verdict of the jury negating the presumption of a lost deed, but took as their ground the contested character of the user. In harmony, as it appears to me, with the last proposition, is the further proposition that the presumption cannot be rebutted by mere proof of the owner of the servient tenement that no grant was in fact made either at the commencement or during the continuance of the enjoyment. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to suppose that among the numerous cases in which easements have been held by the courts to have been acquired by uninterrupted user for twenty years only, there must not have been many in which the owner of the servient tenement at the time when the period com-

menced was alive when the action was tried to contradict, if such evidence had been admissible, the fact of a grant; and if such evidence were admissible, it is almost inconceivable that in the numerous cases in which questions of easements have been discussed, no trace of an opinion to that effect should be found in the observations of the judges. The correct view upon this point I take to be, that the presumption of acquiescence and the fiction of an agreement or grant deduced therefrom in a case where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct. If, instead of its being a mere legal inference, the courts had considered that it was an inference of fact to be drawn by juries like other inferences of fact, and in respect of which the servient owner might be called as a witness to negative the fact by denial of a grant ever having been made, it is difficult to understand how judges could have systematically, as the Lord Chief Justice admits they did, directed juries to find grants "in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction." 3 Q. B. D. 105. The case of *Campbell v. Wilson*, 3 East, 294, lends support to my view upon this point, and illustrates to some extent my meaning when I speak of explanation of the conduct, which is relied upon as leading to the presumption of a grant. There, under an award made twenty-seven years before action, all rights of way in a particular locality, except those set out in the award, of which the way in dispute in the action was not one, had been extinguished. The facts of the case pointed so strongly to the use of the way in question having originated in a mistaken acting under the award, that the judge in his summing up almost assumed the fact; but, having ruled also that notwithstanding it, the proof of subsequent user as of right was sufficient to raise the presumption of a grant, and the jury having found in favor of the defendant, who claimed the way, the court supported both the ruling and the finding; and Le Blanc, J., said: "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favor, or otherwise than under a claim or assertion of right, and indeed, unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant." The direction of the Lord Chief Justice himself to the jury in the case of *Rogers v. Taylor*, 2 H. & N. 828, to which I shall have to refer again, still further supports my view. But while the cases which I have cited throw light upon the point as to what circumstances will not negative the presumption of a grant arising from uninterrupted enjoy-

ment for twenty years, still further light is thrown upon the subject by a consideration of cases cited in the court below, in which the presumption was held to have been properly rebutted. The case of *Barker v. Richardson*, 4 B. & A. 579, was one in which the owner of the servient tenement, a rector, tenant for life, was incompetent to make a grant, and it was held, therefore, that a grant by him could not be presumed. In *Webb v. Bird*, 13 C. B. N. S. 841, which was the case of a claim, as stated in the declaration, to the enjoyment as of right of the "benefit and advantage of the streams and currents of air and wind which had used to pass, run, and flow from the west unto a windmill," and which enjoyment was alleged to have been interrupted by the building of a school-house twenty-five yards to the west of the windmill, Wightman, J., in delivering the judgment of the Court of Exchequer Chamber, said as follows: "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it" (page 843). Again, in *Chasemore v. Richards*, 7 H. L. C. 349, a claim was made to underground water, which merely percolated through the strata in no known channels, and it was held by the House of Lords that the claim could not be supported as a right of property, and that looking to the casual and uncertain, as well as secret character of the enjoyment of such water, no grant of an easement could be presumed.

These cases, therefore, as direct authorities, go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant; and on the other hand, indirectly they tend to support the view that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shown in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, *Qui non prohibet quod prohibere potest assentire videtur*.

[He then, after an examination of the cases, held that an easement for lateral support for buildings from adjoining soil though peculiar in character was in the same category as other easements from the point of view of acquisition by prescription; that a user which is secret raised no presumption of acquiescence; and that the question of notice to the owner of the servient tenement, which was

by the ruling of LUSH, J., in effect withdrawn from the jury, was material (pages 175–184). COTTON, L. J., agreed substantially with THESIGER, L. J.; BRETT, L. J., dissented.] *Judgment reversed.*¹

[From this judgment the defendants appealed to the House of Lords, where the judgment of the Court of Appeal was affirmed. 6 Ap. Cas. 740.]

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WEBB v. BIRD

13 C. B. N. S. 841. 1863.

WIGHTMAN, J.² We took time for the consideration of this case on account of its novel character. It appears by the finding of the arbitrator to whom the case was referred by order of Nisi Prius, that the plaintiff was the owner and occupier of a windmill built in 1829; that, from the time of its being built, down to 1860, the occupier had enjoyed as of right and without interruption the use and benefit of a free current of air from the west for the working of the mill; that, in the last-mentioned year, 1860, the defendants erected a school-house within twenty-five yards of the mill, and thereby obstructed the current of air which would have come to it from the west, whereby the working of the mill was hindered, and the mill became injured and deteriorated in value. Two cases were cited and mainly relied on for the plaintiff, — one in the 2 Rolle's Abridgment, p. 704, and the other in 16 Viner's Abridgment, tit. *Nusance* (G), pl. 19; but both are shortly stated, and amount to little more than *dicta*; and it does not appear that they are anywhere else reported, or in what manner or the terms in which such a right was claimed, whether by prescription or otherwise. There is a third case, called *Trahern's Case*, Godbolt, 233, which was the case of a nuisance caused by building a house so near as to hinder the working of the plaintiff's mill; and the judgment of the court appears in the first instance to have been like that of the case in Rolle's Abridgment, that so much of the house should be thrown down as hindered the working of the mill. But, the plaintiff contending that the whole house should be thrown down, the case was adjourned, and no ultimate decision appears to have been given. These are all the authorities which we have been able to find upon the subject.

We agree with the opinion of the Court of Common Pleas that the right to the passage of air is not a right to an easement within the meaning of the 2 & 3 W. 4, c. 71, § 2.

¹ The order of the Court of Appeal directed that the defendants should elect within fourteen days whether they would take a new trial, and if they did not so elect, that judgment should be entered for the plaintiffs for the amount of damages assessed by the special referee.

² The case was argued before WIGHTMAN, J., BRAMWELL, B., CHANNELL, B., BLACKBURN, J., and WILDE, B. The opinion only is given.

The mill was built in 1829, and so the claim cannot be by prescription.

The distinction between easements, properly so called, and the right to light and air, has been pointed out by Littledale, J., in *Moore v. Rawson*, 3 B. & C. 332, 340; 5 D. & R. 234.

It remains, therefore, to be considered, whether, independently of the Statute, the right claimed may be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a certain term of years. We think, in accordance with the judgment of the Court of Common Pleas, and the judgment of the House of Lords in *Chasemore v. Richards*, 7 House of Lords Cases, 349, that the presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant. As was observed by Lord Wensleydale, it was going very far to say that a man must go to the expense of putting up a screen to window-lights, to prevent a right being gained by twenty years' enjoyment. But, in that case, the right claimed, which was the percolating of water underground, went far beyond the case of a window. In the present case, it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it.

We are therefore of opinion that the judgment of the court below should be affirmed.

BLACKBURN, J. I perfectly concur in the judgment, but wish, for myself, to guard against its being supposed that anything in the judgment affects the common-law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my brother Willes, in the court below, that the case of the right to light, before the Statute, stood on a peculiar ground.

*Judgment affirmed.*¹

¹ Compare *Chastey v. Ackland*, [1895] 2 Ch. 389. See *White v. Chapin*, 12 All. (Mass.) 516; *Swett v. Cutts*, 50 N. H. 439; *Wheelock v. Jacobs*, 70 Vt. 162; *Chasemore v. Richards*, 7 H. L. Cas. 349.

✓
DANIEL v. NORTH

11 East 372. 1809.

THE plaintiff declared in case, upon his seisin in fee of a certain messuage or dwelling-house in Stockport, on one side of which there is and was and of right ought to be six windows; and stated that the defendant wrongfully erected a wall 60 feet high and 50 in length near the said house and windows, and obstructed the light and air from entering the same, &c. At the trial before the Chief Justice of Chester it appeared that the plaintiff's premises, which adjoined those of the defendant, were in 1787 altered by the then occupier, and the windows in question (though somewhat altered since) were then put out towards the defendant's premises; and such windows then received the light and air freely over a low bakehouse, which was before that time, and continued till within the last three years to be, tenanted by one Ashgrove, under Sir George Warrender, from whom the present defendant claimed; upon the site of which bakehouse the defendant, who succeeded Ashgrove, built the erection complained of about two years ago, which was considerably higher than the old bakehouse, and darkened some of the plaintiff's windows; but would have been no injury to the plaintiff's premises, if they had continued in their original state, before the alterations which took place while Ashgrove rented under Sir George Warrender the premises now held by the defendant. There was other evidence given at the trial; but ultimately the question made then, and afterwards argued before this court, was whether Sir George Warrender, the then reversioner of the premises occupied by Ashgrove, were bound by his tenant's acquiescence for above twenty years in the windows put out by the then occupier of the plaintiff's premises against the defendant's premises. It was insisted at the trial that the defendant, standing in the place of the reversioner, was not bound by such acquiescence of the former tenant; but this was overruled by the court below, and the plaintiff recovered a verdict.

LORD ELLENBOROUGH, C. J. The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there were some probable means of his knowing what was done against him. And it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by the tenant of Sir George Warrender, though for twenty years, without the knowledge of the landlord, will bind the latter. And there is no evidence stated in the report from whence his knowledge should be presumed.

GROSE, J., of the same opinion.

LE BLANC, J. The objection was taken at the trial, that the landlord was not bound by the acquiescence of his tenant, without his knowledge, though for twenty years; but that was overruled, and it was considered as a rule of law that the landlord was so bound. It is true, that presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances alluded to of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbors of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake.

BAYLEY, J. The tenant cannot bind the inheritance in this case, either by his own positive act or by his neglect. If indeed the landlord had known of these windows having been put out, and had acquiesced in it for twenty years, that would have bound him; but here there was no evidence that he knew of it till within the last two years.

*Rule absolute.*¹

¹ In *Barker v. Richardson*, 4 B. & Ald. 579, the defendants had erected on land adjoining the plaintiff's a building which darkened certain windows of the plaintiff. These windows had existed for more than twenty years, but during all but six of these years the defendant's land had been in possession of the rector of Saint Edmund as tenant for life.

The court *held* that no easement for light and air to the plaintiff's windows had been acquired. ABBOTT, C. J., said, page 582: — "Admitting that twenty years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold." See *Bright v. Walker*, 1 Cr. M. & R. 211.

In *Cross v. Lewis*, 2 B. & C., 686, the plaintiff claimed an easement over defendant's land for light and air to windows which had existed for at least thirty-eight years. It was shown that defendant's land had been in the possession of a tenant for twenty of these years, but it was not shown that it was so possessed at the time the windows were erected. *Held*, that, as the windows existed before the tenancy began, the plaintiff was entitled to the easement claimed. *Ballard v. Demmon*, 156 Mass. 449; *Ring v. Pugsley*, 18 N. Bruns. 303, 319, *accord*.

In *Davies v. Stephens*, 7 C. & P., 570, the defendant relied on an alleged public right of way over the plaintiff's land. LORD DENMAN, in summing up to the jury, said, page 571: "All the acts of user seem to have taken place during the occupation of tenants, and their submitting to them cannot bind the owner of the land without proof of his also being aware of it; but still, if you think that such acts of user went on for a great length of time, you may presume that the owner had been made aware of them." See *Baxter v. Taylor*, 4 B. & Adol. 72.

In *Reimer v. Stuber*, 20 Pa. 458, the court said, p. 463: —

"Where a tenant for years or for life grants an easement, such grant is

of no force or validity against the reversioner or remainderman. So, if the tenant of a particular estate suffer an easement to be enjoyed for twenty-one years, it raises no presumption of a grant by him in remainder or reversion. But here the land was occupied by tenants from year to year. The owner of the fee was in possession and had the right to bring suit every year. The case is wholly different from that of one who is out of possession during the whole of the time."

See *Pierre v. Fernald*, 26 Me. 436, 442; *Ward v. Warren*, 82 N. Y. 265; *Stahl v. Buffalo Ry. Co.*, 262 Pa. 493; *Cunningham v. Dorsey*, 3 W. Va. 293, 307; *Pentland v. Keep*, 41 Wis. 490.

In *Lund v. New Bedford*, 121 Mass. 286, the plaintiff was the owner of a certain mill and mill privilege. He had agreed to convey the estate to other persons who were in occupation of it. MORTON, J., said, page 290: "Until the conveyance they occupy it as his tenants, and the reversion is in him. For any temporary trespass, which injures only the present enjoyment of the estate, he cannot recover. But for any injury to his reversion he is entitled to maintain an action.

"It is a settled rule, that where an act is done which violates the rights of any one, and which is of such a nature that, if it be continued for a sufficient period of time, the wrong-doer may acquire a title by adverse possession or presumption of a grant, the person whose rights are violated may maintain an action therefor without proof of any other actual damages. . . . In this case, the defendant has constructed permanent conduits and other works for the purpose of supplying the city with water, and has withdrawn and is constantly withdrawing large quantities of water to the injury of the plaintiff's mill privilege, under a claim of right. If its acts are acquiesced in for a sufficient length of time, it might give the defendant a title by adverse possession. For this invasion of his right, the plaintiff Lund may maintain an action without proof of other actual damage."

"REMEDIES FOR INTERFERENCE WITH NATURAL RIGHTS AND DISTURBANCE OF EASEMENTS. A. On the right of action by the possessor of land to which a natural right is incident or to which an easement is appurtenant, although he is not at the time of the interference actually enjoying the right or easement, see:

1. As to natural rights: *Sturges v. Bridgman*, 11 Ch. D. 852; *Dana v. Valentine*, 5 Met. 8; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769, 772; *Harrop v. Hirst*, L. R. 4 Ex. 43; *Roberts v. Gwyrjai District Council*, [1899] 1 Ch. 583; *Blodgett v. Stone*, 60 N. H. 167.

2. As to easements: *Bower v. Hill*, 1 Bing. N. C. 549; *Moore v. Hall*, 3 Q. B. D. 178; *Aynsley v. Glover*, L. R. 18 Eq. 544; *Collins v. St. Peters*, 65 Vt. 618.

It is no answer by the defendant to say that others are doing a similar wrong. *Crossley v. Lightowler*, *supra*; *Rogers v. Stewart*, 5 Vt. 215.

B. On the right of a reversioner to sue:

Merely showing an interference with the natural right or the easement is not enough; he must show an injury to the reversion. The difficulty lies in determining whether such an injury is shown. It is often said that the distinction is between an injury of a permanent character and one simply temporary. A permanent injury was found and a remedy given to the reversioner in *Jesser v. Gifford*, 4 Burr. 2141; *Bell v. Midland R. Co.*, 10 C. B. (N. S.) 287; *Mayfair Propy. Co. v. Johnston*, (1894), 1 Ch. 508; *Baker v. Sanderson*, 3 Pick. 348; *Lund v. New Bedford*, 121 Mass. 286; *Hine v. N. Y. Elevated R. R. Co.*, 128 N. Y. 571; *Kernochan v. Manhattan R. R. Co.*, 161 N. Y. 339. *Kidkill v. Moor*, 9 C. B. 364, came up on motion in arrest of judgment. A temporary injury only was considered as shown in *Simpson v. Savage*, C. B. (N. S.) 347; *Mott v. Shoolbred*, L. R. 20 Eq. 22; *Cooper*

WHEATON v. MAPLE & CO.

[1893] 3 Ch. 48. 1893.

LINDLEY, L. J.¹ The question raised by this appeal is whether the plaintiff is entitled to an easement of light over the land of the defendants. The material facts are as follows: The defendants' land is Crown property. In 1826 a lease of it was granted by the Crown for ninety-nine years from 1815. This lease, therefore, if not previously determined, would expire in 1914. In 1891 this lease became vested in the defendants. On the 5th of September, 1892, they surrendered it to the Crown, and the Crown agreed to grant them a new lease of the same land on certain terms; and the defendants agreed to erect a new building on the land. By this agreement the defendants are to be responsible for, and are to make compensation for, all damage which may be done with respect to (*inter alia*) all rights of air and light which any person may have over the land. Under this agreement the defendants are erecting the building of which

v. *Crabtree*, 20 Ch. D. 589. Cf. *Johnstone v. Hall*, 2 K. & J. 414.

These principles apply to cases of tenancies at will. *Hastings v. Livermore*, 7 Gray, 194.

On the analogous question whether in an action for a nuisance or the disturbance of an easement, entire damages are recoverable in one action or only compensation to the date of the writ, see Sedgwick, *Damages* (8th ed.), §§ 91-95." 2 Gray, *Cas. on Prop.*, 2d ed., p. 255.

¹ Only the opinion of Lindley, L. J., is given.

The sections of the Prescription Act (2 & 3 Wm. IV. c. 71) mentioned in the opinion are as follows:

"II. No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

"III. When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

the plaintiff complains. The plaintiff is the owner in fee of land adjoining the defendants' land. The plaintiff acquired his title in July, 1852, and he then built the house which he seeks to protect. He and his tenants have enjoyed access of light to that house for more than forty years without interruption. The light so enjoyed will be interfered with by the defendants' new building. The plaintiff issued his writ in this action in March, 1893 — i. e., more than forty years after the commencement of his enjoyment, but within three years after the termination of the Crown lease of 1826 by the surrender above mentioned. The plaintiff's contention is (1) that sect. 3 of the Prescription Act (2 & 3 Will. 4, c. 71) applies to the Crown; (2) that, if not, it applies to the Crown's lessees, who have allowed access of light to be enjoyed over their property for twenty years without interruption; (3) that, if the plaintiff has not acquired a title by sect. 3, he has acquired such title by forty years' enjoyment under sect. 2 of the Act; (4) that at all events a lost grant ought to be presumed in his favor, or immemorial enjoyment ought to be inferred. Mr. Justice Kekewich has held that the plaintiff has not acquired an easement in fee against the Crown, but that he had acquired an easement against the lessees of the Crown for the residue of the term of ninety-nine years granted by the lease of 1826, and that the easement so acquired must be treated as subsisting as against the defendants until the year 1914, when that lease would have expired by effluxion of time if the defendants had not surrendered it. From this judgment the defendants have appealed.

Before considering the effect of the statute 2 & 3 Will. 4, c. 71, it is desirable to dispose of the points relied upon by the plaintiff apart from that Act. A grant from the Crown, as distinguished from its tenant, cannot be presumed, for there has been no enjoyment against the Crown itself; and without it there is no foundation for such a presumption. A title by immemorial prescription is excluded by the known history of the plaintiff's house, which was built in 1852 during the pendency of the Crown lease. The Crown lessee might, no doubt, have granted to the plaintiff, his executors, administrators, and assigns, an easement over the land held under the Crown for the residue of the term created in 1826; such an easement, if so created, would bind the lessee, his executors, administrators, and assigns for the residue of the term thereby created; nor could the lessee, or any one claiming under him, defeat the easement so created by surrendering the term. The lessee could only surrender such interest as he had at the time of the surrender, and the surrenderee could only acquire the same interest: see *Doe v. Pyke*, 5 M. & S. 146; *Piggott v. Stratton*, 1 D. F. & J. 33. Moreover, in this respect the Crown would be in no better position than any other surrenderee. If, therefore, the plaintiff had acquired by a grant from the Crown's lessee an easement for the residue of the term granted by the lease

of 1826, the surrender of that lease would not have destroyed such easement; and, notwithstanding the surrender, the easement would have continued, even as against the Crown, until 1914, when the lease would have expired by effluxion of time. But in this case there is no evidence of any grant of any easement by any lessee of the Crown; nor can I infer as a fact such a grant by any of the Crown's lessees. But then it is contended that such a grant ought to be presumed as a matter of law. But this is not so. No such grant is required to account for the state of things which exists, nor is any fiction or presumption necessary to render legal, conduct of the plaintiff which would have been illegal without it. The plaintiff has simply been enjoying his own property, as he was perfectly entitled to do; and no presumption of any grant entitling him to that enjoyment in the past, or to similar enjoyment in future, can properly be made. It is true that it has been said that, after an uninterrupted enjoyment of light for twenty years, a covenant not to interrupt will be presumed: see *Cross v. Lewis*, 2 B. & C. 686; *Moore v. Rawson*, 3 B. & C. 332, 340. But I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distinguished from an inference in fact, in favor of such a grant. This view of the common law is in entire accordance with *Bright v. Walker*, 1 C. M. & R. 211, where this doctrine of presumption is carefully examined.¹

The plaintiff's right to the easement claimed is thus reduced to the statute 2 & 3 Will. 4, c. 71. The section specially applicable to light is sect. 3, which excludes all fictions and presumptions of law and is a clear and simple enactment. [His Lordship read the section.] Two questions arise upon this section in the present case, viz.: Does it bind the Crown? Does it confer a temporary right against a lessee of the Crown, although not as against the Crown itself as reversioner? In *Perry v. Eames*, [1891] 1 Ch. 658, it was decided that, although parts of the statute — viz., sects. 1 and 2 — bind the Crown, yet sect. 3 does not; the reason being that the Crown is expressly mentioned in sects. 1 and 2, and is not mentioned in sect. 3. Upon reflection, I am of opinion that this decision is correct. Con-

¹ See *Wallace v. Fletcher*, 30 N. H. 434, 453; *Kilgour v. Gaddes*, [1904] 1 K. B. 457.

sidering the difference between enjoying light in one's own property and enjoying other easements in other people's property, and considering the great alteration made by sect. 3 in the law applicable to light, I cannot regard sect. 3 as a mere addition or proviso to or qualification of sect. 2. It is what it purports to be — viz., a fresh and independent enactment relating to a different kind of easement. The Legislature may well have thought right to bind the Crown when persons had been for many years actively asserting rights over its property, and may yet have purposely omitted to impose upon the Crown the obligation of not interfering with persons who never, in fact, interfered with it. The Crown is never bound by a statutory enactment unless the intention of the Legislature to bind the Crown is clear and unmistakeable, and this is by no means the case in dealing with the question of lights.

I come now to the last question — viz., whether sect. 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying sect. 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in reading "absolute and indefeasible" as meaning absolute and indefeasible as against all persons to whom the section is applicable. But if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An easement for a term of years may, of course, be created by grant; but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression "absolute and indefeasible," as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shews that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden forever on the servient tenement. This view of the statute was clearly expressed soon after it passed in *Bright v. Walker*, 1 C. M. & R. 221, and although some passages in Baron Parke's judgment in that case have been criticised, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act — viz., by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal. Such a grant or agreement must, moreover, be proved as a fact and not be purely

fictitious. It was contended that *Bright v. Walker* is inconsistent with *Frewen v. Philipps*, 11 C. B. (N. S.) 449; but this is a mistake attributable to the wording of the head-note in the latter case. In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both held under the same landlord. Similar observations apply to *Mitchell v. Cantrill*, 37 Ch. D. 56, and to *Robson v. Edwards*, [1893] 2 Ch. 146.

Although the expression "other easement" occurs in sect. 2, I concur in the view generally hitherto adopted, and judicially held to be correct, in *Perry v. Eames*, [1891], 1 Ch. 658, viz., that light is not included in sect. 2, but is governed entirely by sect. 3 and the subsequent sections which have to be read with it. I may, however, observe that if sect. 2 were applicable to this case, sect. 8 would be also applicable, and that, as the three years there mentioned had not expired before the writ was issued, the plaintiff's right would not have been absolute and indefeasible even under sect. 2. It only remains to add that there are no circumstances in this case giving the plaintiff any equitable, as distinguished from legal, rights against the defendants. For the reasons I have given, I am of opinion that the plaintiff has acquired no right to light under the statute or otherwise, and that the appeal must be allowed and judgment be entered for the defendants, with costs here and below.¹

PARKER v. FOOTE

19 Wend. (N. Y.) 309. 1838.

THIS was an action on the case for stopping *lights* in a dwelling-house, tried at the Oneida Circuit in April, 1836, before the Hon. *Hiram Denio*, then one of the circuit judges.

In 1808 the defendant, being the owner of two village lots situate in the village of Clinton, adjoining each other, sold one of them to Joseph Stebbins, who in the same year erected a dwelling-house thereon, *on the line* adjoining the other lot, with windows in it overlooking the other lot. The defendant also in the same year built an addition to a house which stood on the lot which he retained, leaving a space of about *sixteen feet* between the house erected by Stebbins and the addition put up by himself. This space was subsequently occupied by the defendant as an alley leading to buildings situate on the rear of his lot, and was so used by him until the year 1832, when (*twenty-four years* after the erection of the house by Stebbins,) he erected a store on the alley, filling up the whole space between the two houses, and consequently *stopping the lights* in the house erected

¹ See *Smith v. Kenard*, 2 Hill Law (S. C.) 642 note, 645; *Fear v. Morgan*, [1906] 2 Ch. 406.

by Stebbins. At the time of the erection of the store, the plaintiffs were the owners of the lot originally conveyed to Stebbins, by title derived from him, and were in the actual possession thereof, and brought this action for the stopping of the lights. Stebbins (the original purchaser from the defendant,) was a witness for the plaintiffs, and on his cross-examination testified that he never had any written agreement, deed or writing, granting permission to have his windows overlook the defendant's lot, and that nothing was ever said upon the subject. The village of Clinton is built upon a square called Clinton Green, the sides of the square being laid out into village lots, and contained at the time of the trial about one thousand inhabitants. On motion for a nonsuit, the defendant's counsel insisted that there was no evidence of a *user* authorizing the presumption of a grant as to the *windows*; that the *user* in this case was merely permissive, which explained and rebutted all presumption of a grant. That if the *user*, in the absence of other evidence, authorized the presumption of a grant, still that here the presumption was rebutted by the proof, that in fact there never had been a grant. The circuit judge expressed a doubt whether the modern *English* doctrine in regard to stopping lights was applicable to the growing villages of this country, but said he would rule in favor of the plaintiffs, and leave the question to the determination of this court. He also decided that the fact, whether there was or was not a grant in writing as to the windows, was not for the jury to determine; that the law presumed it from the user, and it could not be rebutted by proving that none had in truth been executed. After the evidence was closed, the judge declined leaving to the jury the question of presumption of right, and instructed them that the plaintiffs were entitled to their verdict. The jury accordingly found a verdict for the plaintiffs, with \$225 damages. The defendant having excepted to the decisions of the judge, now moved for a new trial.

BY THE COURT (BRONSON, J.). The modern doctrine of presuming a right, by grant or otherwise, to easements and incorporeal hereditaments after twenty years of uninterrupted adverse enjoyment, exerts a much wider influence in quieting possession, than the old doctrine of title by prescription, which depended on immemorial usage. The period of twenty years has been adopted by the courts in analogy to the Statute limiting an entry into lands; but as the Statute does not apply to incorporeal rights, the adverse user is not regarded as a legal bar, but only as a ground for presuming a right, either by grant or in some other form. The case of *Holcroft v. Heel*, 1 Bos. & Pull. 400, apparently proceeds on the ground of a legal bar; but the report is inaccurate, as will be seen by the explanation of Le Blanc, J., in *Campbell v. Wilson*, 3 East, 298.

To authorize the presumption, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of

right; and it must be with the knowledge and acquiescence of the owner. *Campbell v. Wilson*, 3 East, 294; *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 B. & Ald. 579; *Hill v. Crosby*, 2 Pick. 466; *Sargent v. Ballard*, 9 Pick 251; *Bolivar Co. v. Neponset Co.*, 16 Pick. 241; *Chalker v. Dickinson*, 1 Conn. R. 382. See also *Doe v. Butler*, 3 Wendell, 149. It is said that there may be cases relating to the use of water, which form exceptions to the rule that the enjoyment must be adverse to authorize the presumption of a grant. See *Bealey v. Shaw*, 6 East, 208; *Ingraham v. Hutchinson*, 2 Conn. R. 584. To this doctrine I cannot subscribe. Without reviewing the cases in relation to the rights of different riparian proprietors on the same stream, I think it sufficient at this time to say, that in whatever manner the water may be appropriated or enjoyed, it must of necessity be either rightful or wrongful. The use of the stream must be such as is authorized by the title of the occupant of the soil over which the water flows, or it must be a usurpation on the rights of another. If the enjoyment is rightful, there can be no occasion for presuming a grant. The title of the occupant is as perfect at the outset, as it can be after the lapse of a century. If the user be wrongful, a usurpation to any extent upon the rights of another, it is then adverse; and if acquiesced in for twenty years, a reasonable foundation is laid for presuming a grant. If the enjoyment is not according to the title of the occupant, the injured party may have redress by action. His remedy does not depend on the question whether he has built on his mill-site, or otherwise appropriated the stream to his own use. It is enough that his right has been invaded; and although in a particular case he may be entitled to recover only nominal damages, that will be a sufficient vindication of his title, and will put an end to all ground for presuming a grant. *Hobson v. Todd*, 4 T. R. 71; *Bolivar Co. v. Neponset Co.*, 16 Pick. 241; *Butman v. Hussey*, 3 Fairfield (Me.), 407.

The presumption we are considering is a mixed one of law and fact. The inference that the right is in him who has the enjoyment, so long as nothing appears to the contrary, is a natural one, — it is a presumption of fact. But adverse enjoyment, when left to exert only its natural force as mere presumptive evidence, can never conclude the true owner. No length of possession could work such a consequence. Hence the necessity of fixing on some definite period of enjoyment, and making that operate as a presumptive bar to the rightful owner. This part of the rule is wholly artificial; it is a presumption of mere law. In general, questions depending upon mixed presumptions of this description must be submitted to the jury, under proper instructions from the court. The difference between length of time which operates as a *bar* to a claim, and that which is only used *by way of evidence*, was very clearly stated by Lord Mansfield, in the *Mayor, &c. v. Horner*, Cowp. 102. "A jury is concluded," he says, "by length of time that operates as a bar,

as where the Statute of Limitations is *pleaded in bar* to a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But length of time *used merely by way of evidence*, may be left to the consideration of a jury to be credited or not, and to draw their inference one way or the other, according to circumstances." In *Darwin v. Upton*, 2 Saund. 175, note (2), the question related to lights, and it was said by the same learned judge that "acquiescence for twenty years is such a decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an absolute bar, like a Statute of Limitations; it is certainly a presumptive bar which ought to go to the jury." Willes, J., mentioned a case before him, in which he held uninterrupted possession of a pew for twenty years to be presumptive evidence merely; in which opinion he was afterwards confirmed by the C. B. The other judges concurred; and Gould, J., before whom the action was tried, said he never had an idea but it was a question for a jury; and he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion.

Some of the cases speak of the presumption as conclusive. *Bealey v. Shaw*, 6 East, 208; *Tyler v. Wilkinson*, 4 Mason, 397. This can only mean that the presumption is conclusive, where there is no dispute about the facts upon which it depends. It has never been doubted that the inference arising from twenty years' enjoyment of incorporeal rights, might be explained and repelled; nor, so far as I have observed, has it ever been denied that questions of this description belong to the jury. The presumption we are considering has often been likened to the inference which is indulged that a bond or mortgage has been paid, when no interest has been demanded within twenty years. Such questions must be submitted to the jury to draw the proper conclusion from all the circumstances of each particular case. *Jackson v. Wood*, 12 Johns. R. 242; *Jackson v. Sackett*, 7 Wendell, 94. In *Sivett v. Wilson*, 3 Bing. 115, the question was on a right of way: the defendant pleaded a grant, and the judge left it to the jury to say, whether they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed; and Best, C. J., said the direction was perfectly right. He added, "I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a judge would not be justified in saying that they *must*, but that they *may* presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly." In *Hill v. Crosby*, 2 Pick.

466, the court set aside the verdict, although they thought it right, because the question had not been referred to the jury.

In a plain case, where there is no evidence to repel the presumption arising from twenty years' uninterrupted adverse user of an incorporeal right, the judge may very properly instruct the jury that it is their duty to find in favor of the party who has had the enjoyment; but still it is a question for the jury. The judge erred in this case in wholly withdrawing that question from the consideration of the jury. On this ground, if no other, the verdict must be set aside.

The bill of exceptions presents another question which may probably arise on a second trial, and it seems proper therefore to give it some examination.

As neither light, air, nor prospect can be the subject of a *grant*, the proper presumption, if any, to be made in this case, is, that there was some *covenant* or *agreement* not to obstruct the lights. *Cross v. Lewis*, 2 Barn. & Cress. 628, *per* Bayley, J.; *Moore v. Rawson*, 3 Barn. & Cress. 332, *per* Littledale, J. But this is a matter of little moment. Where it is proper to indulge any presumption for the purpose of quieting possession, the jury may be instructed to make such a one as the nature of the case requires. *Eldridge v. Knott*, Cowp. 214.

Most of the cases on the subject we have been considering, relate to *ways*, *commons*, *markets*, *watercourses*, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of *windows* overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window. *Chandler v. Thompson*, 3 Campb. 80; *Cross v. Lewis*, 2 Barn. & Cress. 686, *per* Bayley, J. Upon what principle the courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over, or feed his cattle upon it; or divert the water from his mill, or throw it back upon his land or machinery; in these and the like cases, long-continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no *adverse user*, nor indeed any use whatever of another's property; and no foundation is laid for indulging against the rightful owner.

Although I am not prepared to adopt the suggestion of Gould, J., in *Ingraham v. Hutchinson*, 2 Conn. R. 597, that the lights which are

protected may be such as *project* over the land of the adjoining proprietor; yet it is not impossible that there are some considerations connected with the subject which do not distinctly appear in the reported cases. See *Knight v. Halsey*, 2 Bos. & Pull. 206, *per* Rooke, J., 1 Phil. Ev. 125.

The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may *lawfully* have windows looking out upon the lands of his neighbor. 2 Barn. & Cress. 686; 3 Id. 332. The reason why he may lawfully have such windows, must be, because he does his neighbor no wrong; and indeed, so it is adjudged as we have already seen; and yet somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner, remains yet to be settled. 2 Barn. & Cross. 686; 2 Carr. & Payne, 465; 5 Id. 438. Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a *lawful* right on the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be, — not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done in one's own land, is calculated to render a man odious. Indeed, an attempt has been made to sustain an action for erecting such a wall. *Mahan v. Brown*, 13 Wendell, 261.

There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; and I see that it has recently been sanctioned, with some qualification, by an Act of Parliament. Stat. 2 & 3 Will. 4, c. 71, § 3. But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law. 3 Kent's Comm. 446, note (a). Nor do I find that it has been adopted in any of the States. The case of *Story v. Odin*, 12 Mass. R. 157, proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. Const. N. Y., art. 7, § 13.

There were two *nisi prius* decisions at an earlier day, (*Lewis v. Price*, in 1761, and *Dongal v. Wilson* in 1763,) but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin v. Upton* was decided by the K. B. 2 Saund. 175, note (2). This was clearly a departure from the old law. *Bury v. Pope*, Cro. Eliz. 118.

There is one peculiar feature in the case at bar. It appears affirmatively that there never was any grant, writing or agreement about the use of the lights. A grant may under certain circumstances be presumed, although, as Lord Mansfield once said, the court does not really think a grant has been made. *Eldridge v. Knott*, Cowp. 214. But it remains to be decided that a right by grant or otherwise can be presumed when it plainly appears that it never existed. If this had been the case of a way, common, or the like, and there had actually been an uninterrupted adverse user for twenty years under a claim of right, to which the defendant had submitted, I do not intend to say that proof that no grant was in fact made would have overturned the action. It will be time enough to decide that question when it shall be presented. But in this case the evidence of Stebbins, who built the house, in connection with the other facts which appeared on the trial, proved most satisfactorily that the windows were never enjoyed under a claim of right, but only as a matter of favor. If there was anything to leave to the jury, they could not have hesitated a moment about their verdict. But I think the plaintiffs should have been nonsuited.

The CHIEF JUSTICE concurred on both points.

COWEN, J., only concurred in the opinion that the question of presumption of a grant should have been submitted to the jury.

*New trial granted.*¹

¹ The decisions in the United States that no easement for light and air can be acquired by prescription are numerous. 2 Tiffany, Real Prop., 2d ed., § 517. *Contra*, *Clawson v. Primrose*, 4 Del. Ch. 643; but compare *Hulley v. The Security Trust Co.*, 5 Del. Ch. 578. In *Sullivan v. Zeiner*, 98 Cal. 346, it was held that no easement for lateral support to a building can be acquired by prescription. *Mitchell v. Rome*, 49 Ga. 19; *Handlan v. McManus*, 42 Mo App. 551; *Tunstall v. Christian*, 80 Va. 1, accord.

"The registry laws do not extinguish easements by prescription in favor of purchasers without notice." Holmes, J., in *Shaughnessey v. Leary*, 162 Mass. 109, 112.

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LAMB v. CROSLAND.

4 Rich. (So. Car.) 536. 1850.

THIS was an action on the case for obstructing a ditch.

The lands of the parties were adjoining. The plaintiff's land, in 1817, belonged to her husband, one Alexander Lamb. The defendant's land, then, belonged to one Bartholomew Cosnahan. Near Lamb's house were some ponds, which, in wet seasons, were filled with water, and produced sickness. Lamb asked and obtained permission from Cosnahan to cut a ditch through his land, for the purpose of draining those ponds. The ditch communicated with an old ditch, called the meadow ditch, by which the water passed off into Crooked Creek. The land through which the ditch was cut by Lamb, was then woodland; it had since been cleared. The ditch had been kept open as a drain for Lamb's land ever since, and worked on occasionally, when it suited the convenience of those who owned the land. The plaintiff was in possession of Lamb's land. Lamb died in 1836. No evidence of how the plaintiff derived title was given; but it was understood, from the course of the testimony, that it had been sold for partition, and she was the purchaser. B. Cosnahan died in 1820, leaving a widow and infant children, one of whom was not of age until 1841. After his death, the land remained in the possession of his widow and the administrator, until 1833, when it was sold for partition, and purchased by one E. Cosnahan, who sold it to one Feagin in 1836. From him it passed to Green. About 1843, he sold to Dudley, and Dudley to the defendant. In 1847, (in January,) in consequence of the lower part of the ditch not being kept sufficiently open, four acres of the defendant's land, on the side of the ditch, were too wet to plough. He sent to the plaintiff, requested her to open it, but she did not do it. In March, the defendant filled up the ditch with dirt and logs. Some negotiation took place, and the plaintiff opened the ditch, but, as it turned out, not sufficiently, for in July there were very heavy rains, and the water ponded on the four acres, and injured the growing crop. The defendant again obstructed the ditch. It remained so four days, when the plaintiff's son removed the obstruction. But in these four days, the corn in the plaintiff's pond was destroyed. For this injury the action was brought, and the sole question presented by the case was, whether the plaintiff had a prescriptive right to drain her land through this ditch. If she had, the defendant had no right to obstruct it. If she had not, then the defendant had a right to fill it up on his own land.

Evidence was given on the question, whether the use had been adverse, or only permissive. That question was submitted to the jury, who found for the plaintiff.

In his report of the case, his Honor, the presiding judge [*Evans, J.*], says:—

“It was very clear, that from 1820 to 1833, the land of defendant belonged to infants; and there was not the slightest evidence to change the original character of the use, up to the death of B. Cosnahan. My own opinion, founded on a pretty full argument, made in the case of *Boykin v. Cantey*, which I tried at Kershaw, was, that the presumption of title, arising from adverse use, did not arise when the owners were, at the time of its commencement, infants; and that, even in cases of intervening infancy, the presumption was suspended during infancy, for the presumption depends, not on the use alone, but the acquiescence of the owner. In this case, there is no doubt about the facts. The use began in 1817, and continued to 1847, a period of thirty years. But during the time, the land belonged to infants thirteen years, leaving only seventeen years. Entertaining this opinion, if I had left that point to the jury, they of course would have found for the defendant; but I did not feel at liberty, after having spent more than a day on the trial, to arrest the case by a nonsuit, on an undecided point, and one of difficult solution. The case was sent to the jury on the other points, reserving to the defendant the right to renew his motion in the Appeal Court.”

The defendant appealed, and now moved for a nonsuit, or new trial, on several grounds; the fourth ground for a nonsuit was as follows:

Because, admitting that the plaintiff had adverse possession for twenty-nine years, it was in evidence, that for thirteen years of this time, the proprietors of the servient tenement were infants, against whom an adverse possession could not grow into a right.

CURIA, PER EVANS, J. There are several questions presented by the brief in this case, but as the decision depends on the fourth ground for a nonsuit, none of the other questions will be considered. That ground is in the following words, to wit, “admitting that the plaintiff had adverse possession for twenty-nine years, thirteen years of this time the proprietors of the servient tenement were infants, against whom an adverse possession could not grow into a right.” The facts of the case, necessary to be stated in order to understand this ground, are these. In 1817, the ditch, which was the subject of controversy, was dug by Lamb through Cosnahan’s land, by his permission or consent, for the purpose of draining some ponds on the land of Lamb. The ditch has been kept open ever since, until obstructed by the defendant, who now owns the land. In 1820, Cosnahan died, leaving a widow and infant children his heirs at law, one of whom was not of age until 1841. In 1833, the land was sold, under a decree of the Court of Equity, for partition, and purchased by one E. Cosnahan, from whom, by several intermediate conveyances, the defendant derives his title. The question arising on these facts is, whether the plaintiff, who is the owner of Lamb’s

land, to drain which the ditch was dug, has acquired, by the use thereof, a right of drainage against the owner of the land. There is no doubt that, according to our law, as declared in a great many cases, the adverse use of an easement for twenty years will confer a right to the use of it, as fully as if a deed for it were produced and proved. In the ordinary transactions of mankind, we find that men are not disposed to allow others to exercise dominion over their property. When, therefore, we find that such dominion has been exercised for a long period, without objection on the part of the owner, it is reasonable to conclude that such use began in right, or it would have been objected to. This title is founded on the presumption of a grant, which time or accident has destroyed. But this is perhaps a legal fiction, which the law resorts to, to support ancient possessions, and to maintain what the acts of the parties show they considered to exist.

There can be no doubt that, if Cosnahan had lived for twenty years after the use of the ditch commenced, and Lamb had used it adversely, as the jury have found, the right would have been perfect; and I suppose it equally clear, that if the time before Cosnahan's death, added to the time which elapsed after the sale in 1833, together, made the full period of twenty years, the right would be beyond dispute. For in both cases there would be an adverse use, and an acquiescence by those laboring under no disability, for the full period that the law requires to support the presumption of a grant.

In this case these two periods of time amount to only seventeen years, and unless the presumption can arise against the infants, the twenty years is incomplete.

In McPherson on Infants, it is said, (p. 538,) "It is a maxim of law, that laches is not to be imputed to an infant, because he is not supposed to be cognizant of his rights, or capable of enforcing them." In Bacon's Abridg. Title, Infant, G. (5 vol. 110), last edition, it is said: "The rights of infants are much favored in law, and regularly their laches shall not prejudice them, upon the presumption that they understand not their rights, and that they are not capable of taking notice of the rules of law so as to apply them to their advantage." The same doctrine is to be found in all the elementary writers from Coke to the present time. The presumption arises from the acquiescence of the parties interested to dispute it, and it would be difficult to assign a reason for drawing any conclusion from the acquiescence of an infant, who is supposed in law not to be cognizant of his rights, or capable of enforcing them. Accordingly we find, that in all the cases which have been decided, so far as I know, no presumption has been allowed against the rights of an infant, whether the question related to the satisfaction of bonds for the payment of money, or the performance of other acts, or to rights growing out of what Best calls a *non-existing grant*.¹ In *Boyd v. Keels*, decided in

¹ Best on Presump. p. 102 *et seq.*

1830, it was held that no presumption could arise that the condition of a bond of an administrator had been performed, because the distributee, to whom he was to account and pay over the money, was an infant. The same was affirmed in the case of *Brown v. McCall*, 3 Hill, 335. In *Gray v. Givens*, 2 Hill, Ch. R. 514, Judge Harper says, "I think it has not been questioned, that the time during which the party to be affected has been under disability, must be deducted in computing the lapse of time, in analogy to the Statute of Limitations. Such was the case in *Riddlehoover v. Kinard*, 1 Hill, Ch. R. 375. If the possession were taken in early infancy, the title might be matured before the infant arrived at age, and before the Statute of Limitations had begun to run against him. The decisions have been numerous, and the practice habitual, and I am not aware of any doctrine or decisions to the contrary." We have no case involving the right to an easement, in which the question involved in this case has been decided by this court. In *Watt v. Trapp*, 2 Rich. 136, Judge O'Neill, on the circuit, expressed the opinion to the jury, that the presumption of a grant to a way would be arrested by infancy. But that point was not necessarily involved in the case, and this court declined to express any opinion, as, according to my recollection, it was not argued. In other States the question has been decided. In the case of *Watkins v. Peck*, 13 New Hamp. R. 360, it was held, that a grant cannot be presumed from the use and enjoyment of an easement for the term of twenty years, when the party, who must have made the grant as it existed, was an infant at the time of making it. This does not come up fully to the case under consideration, because in this case the grant, if any, must have been made coeval with the use, and that was in the lifetime of Cosnahan, who was adult. But that can make no difference, unless we apply the rule, which has been adopted in relation to some of the clauses of the Statutes of Limitations, viz., that where the Statute begins to run, it will not be arrested by any intervening disability. But this has not been contended for, and there is no semblance of authority to support it. This construction arises on a positive enactment, that the action must be within four years from the time the right of action accrued; whereas presumptions arise from the assertion of the right, and the acquiescence in it, during the whole period of twenty years, and how can it be said that the infants have acquiesced, when they were incapable of asserting their rights?

But the case of *Melvin v. Whiting*, 13 Pick. R. 190, was a case of intervening infancy. The plaintiff claimed title to a several fishery on the defendant's soil, and replied, to support his title, on proof of an adverse, uninterrupted, and exclusive use and enjoyment for twenty years. The jury were instructed by the Chief Justice that, to raise such a presumption of conveyance, it must appear that such exclusive right had been used and enjoyed against those who were able in law to assert and enforce their rights, and to resist such

adverse claim, if not well founded; and, therefore, if the persons against whom such adverse right is claimed, were under the disability of infancy, the time during which such disability continued, was to be deducted in the computation of the twenty years; and this construction was supported by the Court of Appeals. The only *dictum* which I have found to the contrary, is contained in the opinion of Judge Story, in the case of *Tyler v. Wilkinson*, 4 Mason, 402. The action involved the priority of right to use the water in Pawtucket River, and in no way involved the question of the rights of infants. The question which he was discussing was, whether the presumption from adverse use was a *presumptio juris et de jure*, a question of law to be decided by the court, or a fact to be determined by the jury. In support of his argument, that it is a *presumptio juris*, he says the right by presumption of a grant is not affected by the intervention of personal disabilities, such as infancy, coverture, and insanity. This *dictum* is noticed and disregarded in the New Hampshire case above referred to, and I may be permitted to say, without any disrespect to that great and learned judge, that he did not bear in mind the distinction between a right claimed by prescription, and a presumption of right from a non-existing grant. The former requires a use beyond legal memory, the latter may arise within twenty years. Best on Presump. § 88; 3 Stark. Ev. 911, 3d ed., 2 Ev. Poth. 139.

We are of opinion, that the period of time during which the infant heirs of Cosnahan were the owners of the servient tenement, is not to be computed as a part of the twenty years' adverse use necessary to vest the easement in the plaintiff, and upon this ground the plaintiff should have been nonsuited on the circuit. It is therefore ordered that the verdict be set aside, and the defendant have leave to enter up a judgment of nonsuit.

O'NEALL and FROST, JJ., concurred.

*Motion granted.*¹

TRACY v. ATHERTON

36 Vt. 503. 1864.

TRESPASS on the freehold. Plea, the general issue and a special plea justifying the trespass under an alleged private right of way, and also a highway. Trial by jury, April Term, 1862, Pierpoint, J., presiding.

Justification

The testimony tended to show that one Penniman was the owner of a piece of land, adjoining the close described in the declaration, from some time prior to the 1828, until June, 1854, when he sold and conveyed it to one Batchelder; that Batchelder sold and con-

¹ See *Hodges v. Goodspeed*, 20 R. I. 537; *Saunders v. Simpson*, 97 Tenn. 382; 2 Tiffany, Real Prop., 2d ed., § 515.

veyed it to Barber, about the year 1858; and that at the time of the committing of the trespasses in question, the defendants were jointly occupying said land under a contract with Barber for its purchase. That prior to the year 1828, one Jones was the owner of the close mentioned in the declaration, and remained so until the 5th of November, 1833, when, with the knowledge of Penniman, he sold and conveyed it, by deed of warranty, to Griswold W. Tracy, the plaintiff's father, who continued to own and occupy it until the time of his decease, on the 7th of September, 1837. It did not appear that Penniman was present when the deed was executed, or that he knew that the conveyance was by deed of warranty. That at the decease of Griswold W. Tracy this close descended to the plaintiff as heir of Griswold W., and that he has ever since continued to be the owner of it. That at the time of the decease of Griswold W., the plaintiff was a minor, and remained so until the 27th of September, 1853, when he arrived at majority. That for many years prior to the year 1828, there was a public and open highway leading through the close described in the declaration, and through the land so owned by Penniman, which highway was discontinued and fenced up in the summer of 1828, and has so remained ever since. That at or about the time of the discontinuance of this highway, and as a part of the arrangement for throwing up the highway, Penniman having no other means of access to his land, it was orally agreed between Penniman and Jones, that if it was discontinued, Penniman should always have the privilege of passing from the main road to and from his land over the land of Jones, at the place where the highway then was, and in as ample a manner as he had before. That Penniman, his tenants and grantees, down to the time the Penniman lot passed to the defendants, were in the habit frequently, as they had occasion, of passing over the locus in quo with teams, cattle and sheep, without asking or obtaining permission and without any express assertion of a right so to do, but under a claim of right; and that they kept this way in repair.

It appeared that in October, 1837, Mrs. Sarah Tracy, plaintiff's mother, (who, from the time of the death of her husband, always lived with the plaintiff,) was appointed guardian of the plaintiff, and acted as such during his minority; and it also appeared that on the 24th of December, 1850, Penniman wrote and caused to be delivered to Mrs. Tracy, the following letter, to wit:—

December 24, 1850.

MRS. TRACY — *Madam.* My men that are drawing wood, wish to go through your lots. If you will let them pass, I will pay you any reasonable sum you or your neighbors may say.

Respectfully,

A. H. PENNIMAN.

The testimony of Mrs. Tracy, who was called as a witness by the plaintiff, tended to show that she supposed, from the letter itself,

Penniman used the land to drive over.
Mrs. Tracy Oct 1837 pl. mother was appointed guardian of R.L.

that it had reference to the place where the highway formerly crossed the close mentioned in the declaration, and where Penniman and his tenant had been accustomed to pass. But Penniman testified that the letter referred to a different place, and that a different place was used on that occasion. The plaintiff's testimony further tended to show that soon after the conveyance by Penniman to Batchelder, the plaintiff gave permission to Barber, (who had the principal care of the Penniman lot for Batchelder while he owned it,) to take cattle and sheep across the plaintiff's land upon the application of Barber, and refused to grant any privilege to one of the defendants soon after they commenced occupying the Penniman lot.

The plaintiff's testimony further tended to prove that the defendants had driven their stock across the *locus in quo* daily previous to the commencement of this suit.

The defendants' evidence tended to show that their use, and that of those under whom they claimed, was always adverse, continuous, without license and under a claim of right, and applied to any species of use connected with the use of the farm.

The plaintiff requested the court to charge the jury (among other things,) that the infancy of the plaintiff, from the time he became the owner of the *locus in quo* until the 27th of September, 1853, would, if the fact was found, operate as an interruption of the adverse uses of the way by Penniman, and that in determining the question of a prescriptive right to the easement claimed by the defendants, only the time which elapsed after the plaintiff's majority could be considered. Or that if such infancy did not wholly defeat the effect of the previous uses of the way by Penniman, the time during which the infancy existed should be deducted from the whole time of user, and that if after such deduction the adverse enjoyment of the way had not continued for fifteen years, no right could be presumed.

That every renewal of a license to pass across the plaintiff's land at the place in question; every application for such renewal, by the defendants or those preceding them in the chain of title to the Penniman lot; and every admission by the defendants or by their predecessors in the title to said lot, that the use of the way in question had been by the license, consent or indulgence of the owners of the servient close, would conclusively rebut the presumption of a grant; and that the previous enjoyment of such way had been under a claim of right, however long such previous enjoyment might have continued.

The court declined so to instruct the jury, except as follows:—

The court instructed the jury particularly as to what it was necessary for the defendant to prove, to establish in himself the right of way claimed; to which no exception was taken.

The court told the jury that if Penniman, while he owned the farm now owned by the defendant, and before the right of way had become established and vested in the owner of such farm, applied for

Mrs Tracy meant roadway Penniman used to use

Pl. claim.

Def. claim.

Pl. claimed only time after Pl's majority could be considered in prescriptive right.

et. instruction

and obtained a license from the owner or occupier of the Tracy lot, to pass over the place in question, such fact would prevent his acquiring a right of way by any subsequent user, and defeat the claim now set up by the defendant; and the same would be the case in respect to any other owner of said farm. But if the jury found that the right had become established and vested in the owner of said farm by such a use of the way, and for such a period as the court has told them was necessary, a subsequent application, by such owner, for leave to pass over the place in question, and a license given accordingly, would not divest the right and defeat the claim. But that in determining whether the right had become established, such an application, made after the lapse of the required period, would be an important matter for them to consider, in determining whether the use of the way had been of such a character as the court had told the jury was necessary to establish the right. That if Penniman, in his letter of the 24th of December, 1850, referred to a different place from the way in question, such an application would have no effect in this case, even though Mrs. Tracy supposed he referred to the place in question.

The plaintiff excepted to the refusal to charge as requested, and to the charge as above detailed.

POLAND, C. J. The great question in this case is, what effect the infancy of the plaintiff has upon the right of way claimed to have been acquired over the plaintiff's land, by the defendants and their predecessors in title, by prescription, or adverse possession for a period of more than fifteen years. It is now claimed that the jury should have been directed to find on the evidence whether the adverse use of the way began before the land descended to the plaintiff, and should have been instructed on the law of the case on the theory of finding that the adverse use began after the land descended to the plaintiff, and during his infancy. But it appears from the case that the testimony tended to show that the use of the way began as early as 1828, by Penniman, and under a claim of right, in pursuance of the agreement made when it was discontinued as a highway. It does not appear that any evidence was given tending to contradict this; indeed it rather appears that this commencement of the use was shown by the plaintiff's own evidence. None of the requests made by the plaintiff's counsel to the court point to any such state of the case, so that we can only consider this as one of those common efforts to raise a question in this court on exceptions, which was not made at all in the court below.

It must be taken, then, under the finding of the jury, that the use of the way began before the estate descended to the plaintiff, and that it was continued under a claim of right, and without interruption, for more than fifteen years; but that during this period the title came to the plaintiff, who was an infant, and so continued from 1837 to 1853; so that, if the plaintiff was right in his request, that the jury

*user for
at period.*

*use 15
yrs.*

should be charged that only the time after the plaintiff became of age should be reckoned, there was nothing for the jury to consider, and if he was right in his request that the period of his nonage should be deducted, then the jury should have been directed to find whether the use of the way before, and after the disability, was sufficient to make the requisite period.

We understand the case to have been submitted to the jury on this ground: that if the adverse use of the way began during the life of the plaintiff's father, or his grantor, and was continued for the period of fifteen years, without interruption, the right was acquired, though before the expiration of the fifteen years the land over which the way was used, descended to the plaintiff, who was an infant.

The question arises on the correctness of this instruction. The Statute of Limitations does not extend to these incorporeal rights, but it has now become universally settled that an uninterrupted use of a way or other easement, under a claim of right, for the period of time fixed by the Statute as a bar to the recovery of lands held adversely, gives the person so using it a full and absolute right to such easement, as much as if granted to him. This has been settled by a long course of judicial decisions, and is founded primarily on the ancient doctrine of prescriptions, but has finally by the courts been made to conform, by analogy, to the Statute of Limitations applicable to lands, in all substantial particulars, so far as the difference in the subjects will allow.

The general language of the books, found in innumerable cases, is that from such a possession, continued for the period of the Statute, the law will presume a grant, or courts will direct juries to presume a grant. But this is purely a legal fiction. The doctrine proceeds wholly upon the ground of presuming a right after such length of possession, and not at all upon the ground that there ever was a grant made, but which has been lost, and though it may be shown ever so clearly that no grant was ever made, the case is not at all varied.

A great deal of learning has been expended upon the question whether, in such case, the presumption arising from the length of possession is a presumption of law, or one of fact, and all the cases on the subject have been industriously brought to our attention in the argument of this case.

The counsel for the plaintiff say that this presumption of a grant from such long possession is a presumption of fact, to be found by a jury from such possession, unless rebutted, and that therefore any evidence which tends to show that no such grant was made, or could have been made, is admissible, and should be submitted to the jury. If it were true that such was the real ground upon which these rights are sustained, the view of the counsel would be unanswerable. But the counsel themselves do not claim that this grant which is presumed is anything but mere fiction. The true view of the subject is well stated by Wilde, J., in *Coolidge v. Learned*, 8 Pick. 504. He

says: "It has long been settled, that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury a duty to presume a grant, and in all cases juries are so instructed by the court. Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession should not be disturbed."

It is said in many of the cases that this length of possession is only evidence to be submitted to the jury. If by this is meant, that where it is conceded or proved that there has been an uninterrupted possession under claim of right for the requisite time, and this is not encountered by any evidence to rebut the legal effect of it, that it is a proper question to be submitted to the jury to say whether this gives a right, or not, it is not in our opinion correct.

If there be any conflict of evidence as to the length, or character of the case, or any evidence proper to rebut the acquiring the right, it then becomes proper to submit it to the jury. But where it stands solely upon the conceded or proved possession under claim of right for the requisite time, it is never submitted to a jury to find the right established or not, according to their judgments. And whether it is more proper for the court to tell the jury that it is their duty from this to presume a grant, or to tell the jury that from this the law presumes a grant, is mere idle speculation. In fact, and in substance, it is a verdict directed by the court, as a matter of law. And if it were submitted to the jury, and they were to return a verdict against the right, no court would ever accept the verdict.

Mr. Washburn, who reviews all the decisions on the question whether the presumption to be drawn from possession or use of an easement for the required time, is one of law, or one of fact, and who gives the weight of his opinion in favor of its being a presumption of fact for the jury, after all, says, "It may, therefore, be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water, for instance, in a particular way, for more than twenty-one, or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it." Wash. on Eas. &c. 70.

In the case of *Townsend v. Downer*, 32 Vt. 183, Aldis, J., in giving the judgment of the court, says: "When from long possession, with or without auxiliary circumstances, a grant is presumed as *matter of law*, and without regard to the fact whether such a grant was really made or not, then it may with the strictest propriety be said that the law presumes a grant. In such a case, under the prac-

tice in this State, it would be the duty of the court to direct a verdict."

He then proceeds to speak of the class of cases where lapse of time and long possession is relied on with other circumstances, as evidence to establish that a grant has been made in *fact*. The opinion then proceeds: "We do not understand that there is still a third class of cases in which, although the grant is not presumed by the court as pure matter of law, and is not found by the jury as a fact, still the court may direct the jury to presume a grant, and thus by the intervention of the jury, but without the exercise of their judgment upon the evidence, establish the grant as if it were a mere inference of the law. Language may be found in some books and decisions favoring such a view, but the doctrine is clearly against the whole current of English and American decisions, and tends to confound the proper and separate jurisdictions of court and jury. This erroneous view, we think, has arisen from the want of precision in language, when treating of presumptive evidence and the grants proved by or presumed from it."

We think therefore, that in substance the presumption arising from such long-continued possession, unrebutted, is a presumption of *law*, and that it is conclusive evidence, or sufficient evidence to warrant the court in holding that it confers a right on the possessor to the extent of his use.

But it does not in our opinion go very far in determining the question in this case, whether the presumption arising from the length of possession is one of law, or one of fact, for whichever it may be it is liable to be rebutted in various ways. It may be shown to have originated or continued by leave of the owner; that it has not been under a claim of right, or not continuous; or that it has been interrupted by the owner of the land, and whenever any evidence is introduced tending to invalidate the right claimed, on any of these grounds, that the case becomes a proper one to submit to the jury.

But all authorities concur in saying that this doctrine has been adopted and rests upon its analogy to the Statute of Limitations applicable to lands, and both parties in the present case agree that the effect of the plaintiff's disability upon the right claimed by the defendants, is precisely the same that it would be upon lands of the plaintiff holden adversely by the defendants, and their predecessors in title, during the same period. And in our judgment rights to easements acquired by long possession ought to stand on the same ground as rights by possession in lands. The real principle underlying the right, is the same precisely on which the Statute of Limitations stands. In the first place, it is presumed that one man would not quietly submit to have another use and enjoy his property for so great a length of time unless there existed some good reason for his doing so, and that after allowing it for so long, he should not call

upon him to show his right or title, when it may not be in his power to do so; and in the second place, it is a rule of policy, adopted in support of long and uninterrupted possession. It is important too in another view, that the doctrine of the law in the two cases should harmonize, that the people may not be misled and perplexed by having the law different ways upon subjects which in reason and upon principle should be the same.

The requisites of a possession by which an easement is acquired, as generally laid down in the books are, that it should be adverse, under a claim of right, exclusive, continuous and uninterrupted. These are exactly the requisites of a possession of lands to give a title under the Statute of Limitations against the proprietor. But it is sometimes said that the possession must be with the acquiescence of the owner. But this is the same as saying that the possession must be *uninterrupted*. If the owner does not interrupt the possession in any way, he does acquiesce as far as is needful in order to make the possession effectual against him. In the case of lands which are wholly in the possession of a disseisor, in order to make an effectual interruption of the possession, the owner must actually make an entry on the land for that purpose. In *Powell v. Bragg*, 8 Gray, 441, it was decided, that where the owner of the land, over which another had laid an aqueduct, and claimed to have acquired a right by possession upon the land, forbid the owner of the aqueduct from entering upon the land to use the aqueduct, this was such an interruption of the use as prevented the acquirement of an easement right. The owner of the land, being already in possession, could not make an entry to stop the effect of the user, or possession, and his act on the land, of forbidding the other to enter and use the aqueduct, was all he could do to prevent him unless he resorted to force, and ordinarily the law does not require one to use force to assert his rights.

In the case of an entry on land to interrupt the acquiring a right by a disseisor, the owner is not required to use force in order to give legal effect to his entry.

It is not necessary to determine whether such an interruption as was shown in *Powell v. Bragg* would be sufficient to stop the effect of a previous use toward acquiring a right by prescription, but the decision is founded apparently on a sound distinction between an actual adverse possession of lands, and a mere easement upon lands, of which the owner himself is in the actual possession.

Under the English Statute of Limitations, passed as early as the reign of James I., it was uniformly held that disabilities, in order to prevent the operation of the Statute, must exist at the time the right first accrued.

This Statute of James has been the foundation of similar Statutes in this country generally, and though its precise language has hardly ever been adopted, still, the same construction has been generally followed by American courts. The only instance of so wide a departure

from the English Statute as to induce a different construction in this respect is in the State of Kentucky. But the saving in the Kentucky Statute is in favor of those "who are or shall be infants, &c., at the time when the said right or title accrues or comes *to them*." The counsel for the plaintiff claim that our Statute of Limitations of 1797 varies so widely from the English as to require a different construction in this respect, and one similar to that given by the Kentucky courts to theirs.

The Act of 1797 limits rights of entry into lands, and actions for the recovery of lands, to fifteen years next after the right shall accrue to the plaintiff or those under whom he claims. Sect. 10 provides, generally, that it shall not apply to infants, etc., but they shall be allowed to sue within fifteen years after the removal of the disability. It does not say, in terms, that the rights of those disabled when the right *first* accrued shall be saved, as does the English Statute. Neither does it, in terms, save the rights of those who shall be infants, &c., when the right accrues or comes *to them*.

But the question cannot be regarded as an open one in this State. In *McFarland, Adm'r of Burdick, v. Stone*, 17 Vt. 174, the question came before the court. The action was ejectment to recover lands of which Burdick died seised. The defendant had been in possession more than fifteen years before suit brought claiming title. The plaintiff claimed to avoid the Statute on the ground of the disability of the heirs. Two of the heirs were infants at the decease of their father, and fifteen years had not elapsed after they became of age before the suit was brought, and the plaintiff was allowed to recover for their shares of the land. Two other female heirs were infants when the defendant entered upon the land, and before they became of age were married, and so continued till suit brought, so that they had been constantly under disability during the whole period of defendant's possession. The Statute had not run in favor of defendant when the disability of coverture intervened, but more than fifteen years had run after they became of age, before suit brought.

It was decided that their rights were bound by the Statute, and the court held that our Statute should have the same construction as the English, and that no disabilities could be regarded as within the saving, except such as existed at the time the right *first* accrued. If the plaintiff's claim is well founded, that the intervening of a disability, before the Statute has run, arrests it, and entitles the party to fifteen years longer after the disability is removed to sue, then the plaintiff should have recovered the shares of the two female heirs. They could not be in a worse condition after the disability of coverture arose, in consequence of having been all the previous time under the disability of infancy, than they would have been, if before the coverture they had been legally competent to sue, or the right had been in some one else who was competent. The real point

in the case was the same made here, viz.: Must disabilities, in order to be within the saving of the Statute, exist when the right first accrues? — and was fully decided. It was stated in argument by Judge Bennett, that the Statute of 1797 was always understood by the courts, and men of eminence in the legal profession in the State, to be different from the Statute of James in this respect. Judge Bennett's long experience at the bar and upon the bench, entitles his statement to great consideration, but the strictest search has not enabled us to find any trace of such an opinion in our reports, and the case of *McFarland v. Stone*, where the contrary was decided, was tried by Judge Bennett, and his ruling was affirmed in the Supreme Court. So far as we have any knowledge of professional tradition on the subject, the general understanding has been that when the Statute of Limitations once began to run, no subsequent intervening disability would arrest it.

Our present Statute of Limitations is made to conform exactly to the English, by confining the saving of disabilities to such as exist at the time the cause of action accrues, but no one has ever supposed that the law in this respect was changed from what it was under the Act of 1797. Indeed the change of phraseology has been made by revisers, and for the purpose of making the language more exactly express the meaning as judicially determined.

The decisions in relation to the Statute applying to personal actions are all in the same direction. *Hill v. Jackson*, 12 Vt. We are satisfied therefore, that by the settled construction of the Statute of Limitations, a disability in order to prevent the operation of the Statute must exist when the right *first accrues*, and if the analogy of the Statute in this respect is to be followed, it must govern this case. And we see no reason why it should not be in this particular, if in any, as it stands upon the same reason and is governed by the same policy.

The cases that have been cited bearing upon this particular point are contradictory, and no uniform principle seems to have been followed in deciding them. *Melvin v. Whiting*, 13 Pick. 134, is cited by the plaintiff. It was an action for disturbing the plaintiff's fishery. The plaintiff claimed a right to the fishing by long-continued use or prescription. It appeared that after plaintiff's possession commenced, the title under which defendant claimed, became vested in some infant heirs. It was held that the period of minority should be deducted, but as the plaintiff's possession, before the commencement, and after the expiration of the disability, added together, made the requisite length, according to the Statute of Massachusetts, the plaintiff's right was held to be established, and he was allowed to recover. The case seems to have been very little examined by court or counsel, no reasons are given, or authorities cited.

Watkins v. Peck et al., 13 N. H. 360, is also cited by plaintiff.

This was a case in chancery, involving in controversy the right to draw water by aqueduct from a spring. In this case also, during the use from which the right was claimed, the title had descended to minor heirs, and it was held that this interrupted the prescription. Judge Parker, who gave the opinion, says that such a right by long possession rests upon the presumption of a lost grant, and that it would be absurd to presume a grant, where it was clear that no such grant could have existed.

It would almost seem that the distinction between the class of cases where the question is whether there has been a *grant* or *deed in fact*, and those where this presumption is a *mere legal fiction*, was not perfectly clear to so eminent a judge as Judge Parker.

Lamb v. Crosland, 4 Rich. S. C. 536, is also cited by Prof. Washburn, as supporting the same doctrine, but I have not seen the case.

On the other hand the case of *Reimer v. Stuber*, 20 Penn. St. 458, where a right of way was claimed by prescription, and sought to be avoided on the ground of disability, the use began during the minority of the owner of the land, and who before she became of age was married, it was held that the time began to run when she became of age, notwithstanding the subsequent disability of coverture. If the case stood really upon the ground of a presumed grant, and it could not be presumed because the owner was under a disability, and could not make a grant, it must extend through both disabilities. The case can stand only upon the analogy of the Statute. In that view it is clearly correct.

Mibane v. Patrick, 1 Jones N. C. 23, was a claim by the plaintiff that he had acquired a right of way by use. After the use began the owner of the servient estate became insane. It was decided that as the disability did not exist at the time of the commencement of the plaintiff's adverse use, it did not prevent the use ripening into a right. The court say, "Such being the law as to the Statute of Limitations, it follows it must be so, in regard to prescriptions also." The language of Judge Story in *Tyler v. Wilkinson*, 4 Mason, 402, in this respect goes even beyond what we are disposed to hold, indeed disabilities coming clearly within the saving of the Statute, would not avoid a prescription, according to the most general interpretation of his language. But doubtless it was not intended by him to bear so broad a meaning. Prof. Washburn in his treatise on Easements says, "Perhaps the difference in the provisions of the Statutes of Limitations in the different States, may account for the discrepancy in the decided cases." But they can hardly be reconciled on such a basis. In both Massachusetts and New Hampshire, it is fully settled, that under their Statutes of Limitations no disability avoids their operation, unless it exist at the time the right *first accrues*. The decisions in those States must have been made in entire disregard of the analogy of the Statute in this respect, and we think they were made in giving undue importance to the fictitious theory of a lost grant.

The cases opposed to them are in our judgment founded upon much sounder legal reason, and we are disposed to follow the Pennsylvania and North Carolina cases, rather than those nearer home.

This disposes of the principal questions made in the case. The plaintiff claims there was error in the charge in another respect; that if they found the right of way claimed by the defendants fully established by the evidence as to the length and character of the use, any subsequent application for, and obtaining license to use it from the plaintiff, would not divest them of the right. Such subsequent application for license would be very powerful evidence to show that the previous use was not under a claim of right, so as to give a title, but no claim is made but that as evidence, it was given all the force it was entitled to.

But the plaintiff claims that it should have the effect of an estoppel, and prevent the defendants from setting up the right of way they had obtained by the previous use. The claim is put upon the same ground as that of a tenancy, where if a tenant has been admitted into possession by the landlord, he is estopped to deny his title. But we fail to see the analogy, or any good ground upon which an estoppel could be founded. The charge proceeded on the basis that the jury had already found the right of way completely established. The right of the defendants then was the same as if they actually held a conveyance of the right from the plaintiff. In such case it would seem singular that a parol admission of the plaintiff's right, or whether the defendants' want of right, should operate really as a reconveyance of a vested legal right in realty, which cannot be conveyed by parol. We think it can be regarded merely as an admission to be weighed against the defendants and as such the defendants had the full benefit of it.

The only remaining point is the instructions as to the Penniman letter. The letter appears to have been introduced merely as an admission by Penniman of the title of the plaintiff, and his own want of title to any way over the plaintiff's land, by his asking permission to cross. If the letter referred to the way in question, it would be important evidence against his right. If it had reference to another place, and not to this, then it was no admission at all against his right to use this way. If the jury found that the letter referred to the way in question, it does not appear that the plaintiff did not have all the advantage he was entitled to from it, and if they found it referred to another place, and not this, then it was entitled to no force at all as an admission. It does not appear to us material how Mrs. Tracy understood the letter, considered in this light. If it was claimed that by her misunderstanding of the letter, and supposition that it referred to this way, she had conducted differently, and had allowed Penniman to use this way, supposing he was acting under the license obtained in answer to the letter, or omitted to put a stop to his use of it, supposing he acknowledged her right, or

that of her son, then her misunderstanding of the letter might be important as explaining her own action. But nothing of this kind appears in the case. The letter was used to show that Penniman asked leave of Mrs. Tracy to use this way, thus acknowledging her right, and his own want of right. If he was speaking in the letter of another place, it was no acknowledgment at all as to this way, even if Mrs. Tracy by mistake supposed it was. We find no error, and the judgment is affirmed.¹

CARMODY v. MULROONEY

87 Wis. 552. 1894.

APPEAL from the Circuit Court for Grant County.

The action was brought to establish an easement of right of way in the plaintiff over the defendant's lands. The plaintiff claimed a right of way over the defendant's lands by adverse user for more than twenty years. The defendant admitted the user, but denied that it was adverse. There is no conflict in the evidence on the question. The defendant and his grantor for more than twenty years maintained a private way from the residence upon the premises out to the highway, upon their own lands. The plaintiff and the defendant's grantor are relatives, — brothers-in-law. Their lands adjoined. The plaintiff used the same way out to the highway for more than twenty years. Both worked upon the construction and repair of the way. The line of way was changed, in places, several times. Nothing was ever said by either to the other as to the right of the plaintiff to use the way. There was neither express permission nor express claim of right. There was a finding and judgment for the plaintiff, from which the defendant appeals.

NEWMAN, J. One may acquire an easement of right of way over the lands of another by adverse user for a period of twenty years. To have this result, such user must be adverse to the owner of the land, under claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate over which the easement is claimed. Washb. Easem. (4th ed.), 150, par. 26. Such a right can never grow out of a mere tolerated or permissive use. Id. 152. Such adverse user, when continued for twenty years, constitutes a perfect title, as conclusive as a deed or grant. Godd. Easem. (Bennett's ed.), 136. The burden of proving the user to have been adverse is upon the party claiming the easement. Washb. Easem. 150, par. 36a; 2 Greenl. Ev. § 539; *American Co. v. Bradford*, 27 Cal. 360-367. Whether the use has been adverse is

¹ *Ballard v. Demmon*, 156 Mass. 449; *Wallace v. Fletcher*, 30 N. H. 434, accord. The cases are collected in 2 Tiffany, Real Prop., 2d ed., §§ 514, 515. See *Edson v. Munsell*, 10 All. (Mass.) 557.

Presumption on def.

a question for the jury, or for the court when the trial is by the court. 19 Am. & Eng. Ency. of Law, note on page 14, and cases there cited. When it is shown that there has been the use of an easement for twenty years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription, and to authorize the presumption of a grant, unless contradicted or explained. In such a case the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the claim of right by the other party. Washb. Easem. 156, par. 31, and cases cited in note 5; *Garrett v. Jackson*, 20 Pa. St. 331. The finding and judgment of the circuit court are supported by this presumption, and so are in accord with the weight of evidence.

By the Court. — The judgment of the circuit court is affirmed.¹

¹ *Polly v. McCall*, 37 Ala. 20, 31; *Fleming v. Howard*, 150 Cal. 28 (see *Clarke v. Clarke*, 133 Cal. 667, 670); *Mitchell v. Bain*, 142 Ind. 604; *Stewart v. Brumley*, 119 S. W. (Ky.) 798; *Brookshire v. Heap*, 186 Ky. 217; *Barnes v. Haynes*, 13 Gray (Mass.) 188; *Novinger v. Shoop*, 201 S. W. (Mo.) 64; *Moll v. Hagerbaumer*, 98 Neb. 555; *Smith v. Putnam*, 62 N. H. 369; *Hammond v. Zehner*, 21 N. Y. 118 (compare *American Co. v. N. Y. El. Ry. Co.*, 129 N. Y. 252); *Pavey v. Vance*, 56 Ohio St. 162; *Steffy v. Carpenter*, 37 Pa. 41; *Slater v. Price*, 96 S. C. 245; *Muncy v. Updyke*, 119 Va. 636; *Hawkins v. Conner*, 75 W. Va. 220; *Roberts v. Ward*, 85 W. Va. 474, accord. And see *Rollins v. Blackden*, 112 Me. 459.

Contra, *Shea v. Gavitt*, 89 Conn. 359; *C. B. & Q. R. R. Co. v. Ives*, 202 Ill. 69; *Bontz v. Stear*, 285 Ill. 579.

Compare *Davidson v. Nantz*, 177 Ky. 50; *Thompson v. Bowes*, 115 Me. 6; *Kilburn v. Adams*, 7 Met. (Mass.) 33; *Worrall v. Rhoads*, 2 Wharton (Pa.) 427 (see Purdon's Dig. Stats. (1910), p. 5069); *Hutto v. Tindall*, 6 Rich. L. (S. C.) 396; *O'Neil v. Blodgett*, 53 Vt. 213; *Walton v. Knight*, 62 W. Va. 223.

"Protests and mere denials of right are evidence that the right is in dispute, as distinguished from a contested right. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations. Suppose an easement is enjoyed, say, for thirty years. If after such continuance of enjoyment the right may be overthrown by proofs of protests and mere denials of the right, uttered at some remote but serviceable time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has his own folly and supineness to which to lay the blame. But if by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles. Protests and remonstrances by the owner of the servient tenement against the use of the easement, rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and

adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment." — *Per* Depue, J., in *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605, 629–631. *Connor v. Sullivan*, 40 Conn. 26; *Okeson v. Patterson*, 29 Pa. 22; *Demuth v. Amweg*, 90 Pa. 181; *Jordan v. Lang*, 22 So. Car. 159, *accord*.

Contra, *Chicago & N. W. R. R. Co. v. Hoag*, 90 Ill. 339.

Many authorities are collected in 2 Tiffany, Real Prop., 2d ed., § 528.

On interruption of user, see 2 Tiffany, Real Prop., 2d ed., § 527; Connecticut, Gen. Stats. (1918), §§ 6115–6118; Indiana, Annot. Stats. (1914), §§ 6179–6181; Iowa, Annot. Code (1897), §§ 3007–3008; Maine, Rev. States. (1916), c. 110, §§ 12–15; Massachusetts, Gen. Laws, (1920), c. 187; Rhode Island, Gen. Laws (1909), c. 256, §§ 6–7.

As to the extent of the right acquired by prescription where the user has been under color of title, see *Hoag v. Place*, 93 Mich. 450, 459. As to whether actual knowledge by the owner of the servient tenement is necessary, see *Ward v. Warren*, 82 N. Y. 265; *Ludlow v. Indian Orchard Co.*, 177 Mass. 61; *Spencer v. Jennings*, 115 Atl. (Vt.) 270. As to the exclusive user, see *St. Cecilia Soc. v. Universal Car Co.*, 182 N. W. (Mich.) 161; *Reid v. Garnett*, 101 Va. 47. As to tacking, see *Leonard v. Leonard*, 7 All. (Mass.) 277.

See 2 Tiffany, Real Prop., 2d ed., §§ 521, 522, 529.

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CHAPTER III

THE FORM OF CONVEYANCES

NOTE.—On Seisin and Conveyance, see 1 Gray, Cas. on Prop., 2d ed., Bk. III, c. 3, p. 348; Warren, Cas. on Prop., pp. 504-515; 524-547.

The modes of conveying Real Property at common law are: (1) By Livery of Seisin; (2) By Deed; (3) By Parol, or by Parol and Entry; (4) By Record; (5) By Special Custom. The first three are dealt with in the references above, in the present chapter, and in chapter VI.

CONVEYANCES BY RECORD.

Seised
“A. FINES AND RECOVERIES are very ancient collusive suits brought by the person to whom the land is to be conveyed against the person who is to convey it, and resulting in an acknowledgment that the land is the property of the complainant or demandant.

“The clearest account of their mode of operation will be found in 2 Bl. Com. 348-364. They are dealt with more in detail in Smith's Real and Personal Property (5th ed.), 955-1055. Cf. also Challis, Real Property, c. 27. The forms of fines and recoveries are given in the appendix to 2 Bl. Com.

“Although fines and recoveries were most commonly used to bar estates tail, they were by no means confined to this. A fine, for instance, was the means ordinarily employed to pass a married woman's interest.

“I. (1) A tenant in fee simple *in possession* could convey by *fine* or *recovery*. Although the seisin was tortious, yet under the St. 4. Hen. VII. (1489) c. 24, after a *fine with proclamations* had been levied, the claims of all persons, not under disability, were barred at the end of five years after the fine, or, if their claims arose after the fine, then five years from the time they arose. This was in effect substituting a period of five years only for the time required by the Statute of Limitations. This result was not worked by a *fine without proclamations* nor by a *recovery*. (2) A *fine* by one seised *in remainder* in fee passed his interest; so although a *recovery* could not properly be suffered unless there was a tenant to the *præcipe*, that is, some one seised of an estate of freehold in possession, who would join in recovery, yet if a recovery was suffered by a tenant in fee in remainder, without a proper tenant to the *præcipe*, he was bound by estoppel. A *fine with proclamations* under the St. Hen. VII., levied by one seised in fee in remainder or reversion, would, after five years, bar all interests (except the preceding estate which supported the remainder), although the particular estates and the remainders or reversion had been created by a tortious conveyance. Co. Lit. 298 a.

“II. The Statute *de Donis*, 13 Edw. I. (1285) c. 1, which is given in the 1st vol. of the Cases, p. 335, provided that an estate tail could not be barred by a fine. By *Taltarum's Case*, Y. B. 12 Edw. IV. 19 (1473), the validity of a common recovery to bar an estate tail was recognized. (1) By Sts. 4 Hen. VII. c. 24 (1489), and 32 Hen. VIII c. 36 (1540), a tenant in tail *in possession* by a *fine levied with proclamations* barred the heirs in tail of the tenant immediately, and, in five years after their respective rights accrued, all remaindermen and reversioners and other persons except the Crown. A *recovery*, properly suffered, barred immediately all persons except the Crown. (2) A tenant in tail *in remainder* could under the Statutes above cited, by a *fine with proclamations* and non-claim, bar the heirs in tail and outside persons, but not subsequent remaindermen or the reversioner. A tenant in tail

in remainder could, by a *recovery*, bar the subsequent estates, provided the immediate tenant of the freehold would join in the recovery; but if he did not join, then, for want of a good tenant to the *præcipe*, the recovery barred neither the issue in tail nor the remaindermen, nor reversioner. This was partially altered by St. 14 Geo. II. c. 20, § 1 (1740).

"III. (1) A *fine* or *recovery* by a tenant for life in *possession* worked a forfeiture of his estate, and was no bar to vested estates in remainder or to the reversion, but it destroyed contingent remainders. *Doe d. Davies v. Gatacre*, 5 Bing. N.C. 609 (1839). Under the Statute 4 Hen. VII. c. 24, however, a *fine* by tenant for life *with proclamations* and five years' non-claim barred all persons. (2) A *fine* or *recovery* by a tenant for life in *remainder* had no effect except to pass his interest; a *fine* by him *with proclamations* under the Statute did not bar any subsequent estates in remainder or reversion, but did probably bar, after the period of non-claim, all outside claims.

"IV. If a *fine* was levied, with or without proclamations, or a *recovery* suffered by a tenant for years, he forfeited his estate, but no bar was created. If a tenant for years made a tortious feoffment in fee, and the feoffee levied a *fine* with proclamations, then after the period of non-claim he got a good title.

"V. If one who had no estate in the land, levied a *fine* or suffered a *recovery*, it had no effect on third persons, but he was himself estopped, if he afterwards became entitled to the land.

"The effect of a *fine* with proclamations under the Statute of 4 Hen. VII. and non-claim, was to pass the title, and not merely to bar the remedy. A *fine* of an incorporeal hereditament levied by a life tenant, passed no more than the cognizor's interest; yet such *fine* was a forfeiture, as it was in case of a corporeal hereditament. Lit., § 618.

"The *fine* spoken of in this note is the ordinary *fine sur cognizance de droit, come ceo que il ad de son done*; the *finer sur cognizance de droit tantum* and *sur concessit* had more limited effects.

"By the St. 3 & 4 Wm. IV, c. 74, § 2 (1833), *finer* and *recoveries* were abolished.

"*Fines* and *recoveries* are generally done away with or are obsolete in the United States.

"B. PUBLIC GRANTS. These are sometimes made by Act of the Legislature, sometimes by the Crown, or other executive power.

"See 2 Bl. Com. 344-348; 3 Wash. R. P., book iii, c. 3, § 1.

CONVEYANCE BY SPECIAL CUSTOM.

"On the mode of alienating copyholds, see 1 Gray, Cas. on Prop. (2d ed.) p. 364; 2 Bl. Com. 365.

"The peculiar tenure known as tenant right is copyhold, although title is passed by deed and admittance, instead of surrender and admittance. See Scriven, Copyholds (6th ed.), 14-17. But see *Bingham v. Woodgate*, 1 Russ. & Myl. 32 (1829).

"Limitations of copyholds are construed in the same manner as limitations of freeholds and the Rule in *Shelley's Case* applies to copyholds. Scriv. 95, 96.

"The Statute *De Donis* did not apply to copyholds; and therefore if, in a manor, a copyhold can be entailed (as is sometimes the case), it must be by virtue of a special custom; but where there is no custom to entail, a grant of copyhold land to A. and the heirs of his body will generally give him a fee simple conditional. Challis, Real Prop., 3d ed., 300. Where an entail of a copyhold cannot be barred by the custom in any other way, it is barred by a surrender. Scriv. 40-46. A copyholder may lease land for a year, by the general custom of the realm, without his lord's license. Scriv. 192. Admittance is compelled by *mandamus* or bill in equity. Scriv. 366-368, 376." 3 Gray, Cas. on Prop., 2d ed., pp. 191, 192.

Custom

SECTION I.

CONVEYANCES TO STRANGERS.

NOTE.—At common law estates of freehold in land could be created by livery of seisin. Estates of less than freehold could be created by parol agreement and entry. Present estates of freehold could be transferred by livery of seisin. Present estates of less than freehold could be transferred by parol agreement and entry. Reversions and vested remainders could be transferred by deed. See 1 Gray, *Cas. on Prop.*, 2d ed., pp. 341, 342, 348–355, 357–363. Warren, *Cas. on Prop.*, pp. 510–512.

Conveyances by livery of seisin might have a tortious operation; conveyances by deed or parol and entry were innocent. Some sections from Littleton are given below to bring out more clearly the distinction between tortious and innocent conveyances.

Rights in land, such as easements and profits, could be created and transferred by deed, but not by parol, even though they were for years only. 2 Bl. Com. 317; *Somerset v. Fogwell*, 5 B. & C. 875; *Bird v. Higginson*, 2 A. & E. 696.

The Statute of Uses, 27 Hen. VIII, c. 10 (1536), made possible new methods of conveyancing. A use, both before and after the Statute, could be raised for a pecuniary consideration, called a bargain and sale; or, after the Statute, by a covenant for a consideration of blood or marriage, called a covenant to stand seised. The use, or equitable interest, so raised was, by operation of the Statute, converted into a corresponding legal estate. See 1 Gray, *Cas. on Prop.*, (2d ed.), pp. 368–416; Warren, *Cas. on Prop.*, pp. 524–528.

The Statute of Enrolments, 27 Hen. VIII, c. 16 (1536), required that all bargains and sales of estates of freehold should be enrolled. This statute has not been adopted as part of the law of this country. It is given in 1 Gray, *Cas. on Prop.*, 2d ed., p. 382; and in Warren, *Cas. on Prop.*, p. 525.

The requirements of the Statute of Frauds, 29 Car. II, c. 3, §§ 1–3 (1677), are given in full below.

It was held in *Jackson d. Gouch v. Wood*, 12 Johns. (N. Y.) 73 (1815), that a bargain and sale of a freehold estate must be under seal. But see Kales, *Estates and Future Interests*, 2d ed., §§ 64, 456. The same result has been reached by statute in a number of states. As to statutory provisions regarding the use of seals, see Stimson, *Am. Stat. Law.*, § 1564, and statutes *post* p. 607.

LIT. § 609. For if I let land to a man for term of his life, &c., and the tenant for life letteth the same land to another for term of years, &c., and after my tenant for life grant the reversion to another in fee, and the tenant for years attorn, in this case the grantee hath in the freehold but an estate for term of the life of his grantor, &c., and I which am in the reversion of the fee simple may not enter by force of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but always remains unto me, as it was before, notwithstanding such grant of the reversion made to the grantee, to him and to his heirs, &c., because nothing passed by force of such grant, but the estate which the grantor hath, &c.

LIT. § 610. In the same manner is it, if tenant for term of life by his deed confirm the estate of his lessee for years, to have and to

hold to him and his heirs, or release to his lessee and his heirs, yet the lessee for years hath an estate but for term of the life of the tenant for life, &c.

LIT. § 611. But otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made but an estate for term of years, &c.

LIT. § 613. Also, if tenant in tail by his deed grant to another all his estate which he hath in the tenements to him entailed, to have and to hold all his estate to the other, and to his heirs forever, and deliver to him seisin accordingly; in this case the tenant to whom the alienation was made hath no other estate but for term of the life of tenant in tail. And so it may be well proved that tenant in tail cannot grant nor alien, nor make any rightful estate of freehold to another person, but for term of his own life only, &c.

LIT. § 615. Also, if land be let to a man for term of his life, the remainder to another in tail, if he in the remainder will grant his remainder to another in fee by his deed, and the tenant for life attorn, this is no discontinuance of the remainder.

LIT. § 617. Also, if a man be tenant in tail of an advowson in gross, or of a common in gross, if he by his deed will grant the advowson or common to another in fee, this is no discontinuance; for in such cases the grantees have no estate but for term of the life of tenant in tail that made the grant, &c.

LIT. § 618. And note, that of such things as pass by way of grant, by deed made in the country, and without livery, there such grant maketh no discontinuance, as in the cases aforesaid, and in other like cases, &c. And albeit such things be granted in fee, by fine levied in the king's court, &c., yet this maketh not a discontinuance, &c.

LIT. § 619. [Note, if I give land to another in tail, and he letteth the same land to another for term of years, and after the lessor granteth the reversion to another in fee, and the tenant for years attorn to the grantee, and the term expireth during the life of the tenant in tail, by which the grantee enter, and after the tenant in tail hath issue and die; in this case this is no discontinuance, notwithstanding the grant be executed in the life of the tenant in tail, for that at the time of the lease made for years, no new fee simple was reserved in the lessor, but the reversion remained to him in tail, as it was before the lease made.]¹

LIT. § 620. But if the tenant in tail make a lease for term of the life of the lessee, &c., in this case the tenant in tail hath made a new reversion of the fee simple in him; because when he made the lease for life, &c., he discontinued the tail, &c., by force of the same lease, and also he discontinued my reversion, &c. And it behooveth that

¹ Lord Coke says this is not in the original, but yet is good law.

Rule!

the reversion of the fee simple be in some person in such case: and it cannot be in me which am the donor, inasmuch as my reversion is discontinued; *ergo*, the reversion of the fee ought to be in the tenant in tail, who discontinued my reversion by lease, &c. And if in this case the tenant in tail grant by his deed this reversion in fee to another, and the tenant for life attorn, &c., and after the tenant for life dieth, living the tenant in tail, and the grantee of the reversion enter, &c., in the life of the tenant in tail, then this is a discontinuance in fee; and if after the tenant in tail dieth, his issue may not enter, but is put to his writ of *formedon*. And the cause is, for that he which hath the grant of such reversion in fee simple, hath the seisin and execution of the same land and tenements, to have to him and to his heirs in his demesne as of fee, in the life of the tenant in tail.

And this is by force of the grant of the said tenant in tail.

LIT. § 622. But in this case, if tenant in tail that grants the reversion, &c., dieth, living the tenant for life, and after the tenant for life dieth, and after he to whom the reversion was granted enter, &c., then this is no discontinuance, but that the issue of the tenant in tail may well enter upon the grantee of the reversion; because the reversion which the grantee had, &c., was not executed, &c., in the life of the tenant in tail, &c. And so there is a great diversity when tenant in tail maketh a lease for years, and where he maketh a lease for life; for in the one case he hath a reversion in tail, and in the other case he hath a reversion in fee.

LIT. § 623. For if land be given to a man and to his heirs males of his body engendered, who hath issue two sons, and the eldest son hath issue a daughter and dieth, and the tenant in tail maketh a lease for years and die, now the reversion descendeth to the younger son, for that the reversion was but in the tail, and the youngest son is heir male, &c. But if the tenant had made a lease for life, &c., and after died, now the reversion descendeth to the daughter of the elder brother, for that the reversion is in the fee simple, and the daughter is heir general, &c.

LIT. § 631. But where the tenant in tail maketh a lease for years or for life, the remainder to another in fee, and delivereth livery of seisin accordingly, this is a discontinuance in fee, for that the fee simple passeth by force of the livery of seisin, &c.¹

29 CAR. II. c. 3, §§ 1-3. For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury; (2) be it enacted by the King's most ex-

¹ "An Act of 8 & 9 Victoria, chapter 106, section 4, abolished all tortious operation of *jeoffments*. In this country the common-law doctrine of *disseizin* and tortious conveyance was in force to some extent in the colonies and States on the Atlantic seaboard, but the tortious effect of such conveyances has been abolished directly by statute, or ceased because the conveyance by *livery* has itself fallen into disuse." Kales, Estates and Future Interests, 2d ed., § 46.

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cellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

Parol

Rule!

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

Exception

III. And moreover, That no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

No.
assignment
after June
20-

SECTION II.

RELEASES.

LIT. § 444. Releases are in divers manners, viz., releases of all the right which a man hath in lands or tenements, and releases of actions personals and reals, and other things. Releases of all the right which men have in lands and tenements, &c., are commonly made in this form, or of this effect:—

LIT. § 445. Know all men by these presents, that I, A. of B., have remised, released, and altogether from me and my heirs quit-claimed (*me A. de B. remisisse, relaxasse, et omnino de me et hæredibus meis quietum clamasse*): or thus, for me and my heirs quit-claimed to C. of D. all the right, title, and claim (*totum jus, titulum, et clameum*) which I have, or by any means may have, of and in one messuage with the appurtenances in F., &c. And it is to be understood, that these words, *remisisse et quietum clamasse*, are of the same effect as these words, *relaxasse*.

LIT. § 447. Also, in releases of all the right which a man hath in certain lands, &c., it behooveth him to whom the release is made in any case, that he hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made hath the freehold in deed, or in law, at the time of the release, &c., there the release is good.

LIT. § 449. Also, in some cases of releases of all the right, albeit that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which he hath by disseisin to another for term of his life, saving the reversion to him, if the disseisee or his heir release to the disseisor all the right, &c., this release is good, because he to whom the release is made, had in law a reversion at the time of the release made.

LIT. § 450. In the same manner it is, where a lease is made to a man for term of life, the remainder to another for term of another man's life, the remainder to the third in tail, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because every of them hath a remainder in deed vested in him.

LIT. § 451. But if the tenant for term of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all his right, this release is void, because he had not a remainder in deed at the time of the release made, but only a right of a remainder.

LIT. § 459. Also, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c., before

that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

LIT. § 460. In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c., this release is good enough for the privity which is between them; for it shall be in vain to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

But the contrary is holden, Pasch. 2 E. 4, by all the justices.¹

LIT. § 461. But where a man of his own head occupieth lands or tenements at the will of him which hath the freehold, and such occupier claimeth nothing but at will, &c., if he which hath the freehold will release all his right to the occupier, &c., this release is void, because there is no privity between them by the lease made to the occupier, nor by other manner, &c.

LIT. § 465. Also, releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to whom the release is made. As if I let certain land to one for term of years, by force whereof he is in possession, and after I release to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath he an estate but for term of his life. And the reason is, for that when the reversion or remainder is in a man who will by his release enlarge the estate of the tenant, &c., he shall have no greater estate, but in such manner and form as if such lessor were seised in fee, and by his deed will make an estate to one in a certain form, and deliver to him seisin by force of the same deed; if in such deed of feoffment there be not any word of inheritance, then he hath but an estate for life; and so it is in such releases made by those in the reversion or in the remainder. For if I let land to a man for term of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and to his heirs, then

¹ "By these two sections is to be observed a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because between them there is a possession with a privity; but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for years hold over his term, &c., a release to him is void, for that there is no privity between them; and so are the books that speak of this matter to be understood.

"'But the contrary is holden,' &c. This is of a new addition, and the book here cited ill understood, for it is to be understood of a tenant at sufferance." Co. Lit. 270 b.

he hath a fee simple; and if I release to him and to his heirs of his body begotten, then he hath a fee tail, &c. And so it behooveth to specify in the deed what estate he to whom the release is made shall have.

LIT. § 466. Also, sometimes releases shall inure *de mitter*, and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his state was wrongful, now by this release it is made lawful and right.

LIT. § 467. But here note, that when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speak of the heirs of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an hour, this shall be as strong to him in law as if he had released to him and his heirs. For when his right was once gone from him by his release without any condition, &c., to him that hath the fee simple it is gone forever.

LIT. § 468. But where a man hath a reversion in fee simple, or a remainder in fee simple, at the time of the release made, there if he will release to the tenant for years, or for life, or to the tenant in tail, he ought to determine the estate which he to whom the release is made shall have by force of the same release, for that such release shall inure to enlarge the estate of him to whom the release is made.

LIT. § 469. But otherwise it is where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heirs of him to whom the release is made. For if I let lands to one for term of his life, if I after release to him to enlarge his estate, it behooveth that I release to him and to his heirs of his body engendered, or to him and his heirs, or by these words, To have and to hold to him and to his heirs of his body engendered, or to the heirs male of his body engendered, or such like estates, or otherwise he hath no greater estate than he had before.

LIT. § 470. But if my tenant for life letteth the same land over to another for term of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for term of life, I shall be barred forever, albeit that no mention be made of his heirs, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, which my tenant made in this case, my reversion was discontinued, &c., and this release shall inure to him in the remainder, to have advantage of it, as well as to the tenant for term of life.

LIT. § 471. For to this intent the tenant for term of life and he

in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him, &c.

LIT. § 479. But releases which inure by way of extinguishment against all persons, are where he to whom the release is made cannot have that which to him is released. As if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seigniory, or all the right which he hath in the land, &c., this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself.

LIT. § 480. In the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, &c., because the tenant cannot have that which to him is released, &c., so such releases shall inure by way of extinguishment in all ways.¹

¹ A release inuring by way of *mitter l'estate* is "where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releases to the other the benefit of it. In releases which operate by this last mode, the releasee being supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or pretension of another seised under the same contract, words of inheritance in the release are useless; but where the release operates by enlargement, the releasee having no such previous inheritance, and fiefs being either for life or in fee, as they are originally granted, the release gives the estate to the releasee for his life only, unless it be expressly made to him and his heirs." Butler's note to Co. Lit. 273 b.

SECTION III

SURRENDERS

Co. Lit. 337 b. "Surrender," *sursum redditio*, properly is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.

Co. Lit. 338 a. A surrender properly taken is of two sorts, viz. a surrender in deed, or by express words, (whereof Littleton here putteth an example,) and a surrender in law wrought by consequent by operation of law. Littleton here putteth his case of a surrender of an estate in possession, for a right cannot be surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendered, because there is no reversion wherein it may drown; but by a surrender in law it may be drowned. As if the lessee before Michaelmas take a new lease for years either to begin presently, or at Michaelmas, this is a surrender in law of the former lease. *Fortior et æquior est dispositio legis quam hominis.*

Also there is a surrender without deed, whereof Littleton putteth here an example of an estate for life of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yielding, or a restoring of, the state again to him in the immediate reversion or remainder, which are always favored in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot commence without deed, and by consequent the estate cannot be surrendered without deed. But in the example that Littleton here putteth, the estate might commence without deed, and therefore might be surrendered without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and quality of the thing demised, because the particular estate might have been made without deed; and so on the other side. If a man be tenant by the curtesy, or tenant in dower of an advowson, rent, or other thing that lies in grant; albeit there the estate begin without deed, yet in respect of the nature and quality of the thing that lies in grant it cannot be surrendered without deed. And so if a lease for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. See in my Reports plentiful matter of surrenders.¹

¹ See St. 29 Car. II, c. 3, § 3 (1677) given *ante*, p. 148.

Surrenders of estates for years are dealt with further in chapter VI. on Landlord and Tenant, *post*, p. 372.

Take 154 - 157

def
Two kinds:
1. Surrender in deed
2. Surrender in law

Surrender without deed.

Exchange

NOTE.

EXCHANGE. LIT. § 62. And in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin; and such exchange made by parol of tenements within the same county without writing is good enough.

Free Tail Simple.

LIT. § 63. And if the lands or tenements be in divers counties, viz., that which the one hath in one county, and that which the other hath in another county, there it behooveth to have a deed indented made between them of this exchange.

LIT. § 64. And note, that in exchanges it behooveth, that the estates which both parties have in the lands so exchanged, be equal; for if the one willeth and grant that the other shall have his land in fee tail for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is void, because the estates be not equal.

Estates must be

LIT. § 65. In the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general, and the other in the other land fee tail especial, &c. So always it behooveth that in exchange the estates of both parties be equal, viz., if the one hath a fee simple in the one land, ~~that the other shall have~~ like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land, &c., and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a far greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equal. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.

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Co. LIT. 51. b. To shut up this point, there be five things necessary to the perfection of an exchange. 1. That the estates given be equal. 2. That this word (*excambium*, exchange) be used, which is so individually requisite, as it cannot be supplied by any other word, or described by any circumlocution: and herewith agreeth Littleton afterwards in this section. In the book of Domesday I find, "Hanc terram cambiavit Hugo Briccuino quod modo tenet comes Meriton, et ipsum scambium valet duplum."

5 essentials.
1. Equal est.
2. Words.
3.

"Hugo de Belcamp pro escambio de Warres."

3. That there be an execution by entry or claim in the life of the parties, as hath been said. 4. That if it be of things that lie in grant, it must be by deed. 5. If the lands be in several counties, there ought to be a deed indented, or if the thing lie in grant, albeit they be in one county.

*3 Execution
4. Deed.
5. Indenture deed.*

PERK. § 265. If an exchange be made between me and T. K., viz., that after the feast of Christmas, he shall have my manor of Dale, in exchange for for his manor of Sale, &c., it is a good exchange; and each of us may enter into the other's manor, after Christmas, &c.

See Statute of Frauds, St. 29 Car. II, c. 3 (1677), St. 8 & 9 Vict., c. 106, § 3 (1845), and *Windsor v. Collinson*, 32 Oreg. 297.

PARTITION. See Joint Ownership, *post*, p. 421.

FORM OF CONVEYANCE. LIT. § 370. And for that such conditions are most commonly put and specified in deeds indented, somewhat shall be here

said (to thee, my son) of an indenture and of a deed poll concerning conditions. And it is to be understood, that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together be.

Co. Lit. 229 a. "In deeds indented." Those are called by several names, as *scriptum indentatum*, *carta indentata*, *scriptura indentata*, *indentura*, *literæ indentatæ*. An indenture is a writing containing a conveyance, bargain, contract, covenants, or agreements between two or more, and is indented in the top or side answerable to another that likewise comprehendeth the self-same matter, and is called an indenture, for that it is so indented, and is called in Greek *σύγγραφον*.

If a deed beginneth, *hæc indentura*, &c., and in troth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting.

"In deeds indented." And here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a stone, or the like, &c., and the same be sealed or delivered, yet it is no deed, for a deed must be written either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption.

"If the indenture be bipartite, or tripartite, or quadripartite, &c." "Bipartite" is, when there be two parts and two parties to the deed. "Tripartite," when there are three parts and three parties; and so of "quadripartite," "quinquepartite," &c.

"And of a deed poll." A deed poll is that which is plain without any indenting, so called because it is cut even, or polled. Every deed that is pleaded shall be intended to be a deed poll, unless it be alleged to be indented.

"All the parts of the indenture are but one deed in law." If a man by deed indented make a gift in tail, and the donee dieth without issue, that part of the indenture which belonged to the donee doth now belong to the donor, for both parts do make but one deed in law.

"And every part of the indenture is of as great force, &c." This is manifest of itself, and is proved by the books aforesaid.

It is to be observed, that if the feoffer, donor, or lessor seal the part of the indenture belonging to the feoffee, &c., the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffer, &c. See also Butler's note (138) *ad loc.*

On the reason why deeds are required to be on paper or parchment, see Pollock, Contracts, 2d ed., p. 129.

In *Burchell v. Clark*, 1 C. P. D. 602; s. c. 2 C. P. D. 88 (1876), the *habendum* of a lease stated the term as ninety-four and one quarter years, the *reddendum* stated it as ninety-one and one quarter years, and in the counterpart the *habendum* and *reddendum* both stated the term as ninety-one and one quarter years. The Common Pleas Division (*Brett and Archibald*, JJ.) held, that the statement of the *habendum* must prevail. But the Court of Appeal (*Cockburn*, C. J., and *Bramwell* and *Amplett*, JJ.; *Kelly*, C. B., dissenting) reversed the judgment of the Common Pleas Division.

RECITAL OF CONSIDERATION. "It is at least well settled that the recital of consideration in a deed of conveyance estops the grantor to deny the existence of that consideration for the purpose of impeaching the validity of the

Formality

Types

deed, as a deed of bargain and sale. 3 Washburn on Real Property (6th ed.) § 2283; *Stannard v. Aurora, etc. R. R. Co.*, 220 Ill. 469. Lord Hardwicke was of the opinion that for whatever purpose such evidence was offered, proof could not be given that the consideration stated in a deed was in fact not the whole consideration, unless such words 'and other considerations' followed the statement of specific consideration. *Peacock v. Monk*, 1 Ves. Sr. 127, 128. But so strict a rule is no longer applied either in England or America. By a relaxation originating in equity and extending to courts of law, additional consideration may be shown which is not repugnant to the consideration named. And, generally, at the present time, even though the consideration in fact was entirely different from the consideration named in the deed, and not merely additional to it, the truth may be shown for any purpose except the impeachment of the validity of the deed for lack of consideration, unless the stated consideration is promissory in character and not merely a recital of fact." Williston, Contracts, § 115a.

See *Trafton v. Howes*, 102 Mass. 533, 541; *Clifford v. Turrill*, 9 Jur. 633; Kales, Estates and Future Interests, 2d ed., § 62.

"If owing to some rule of law, a deed fail to take effect in the manner intended, it will, if possible, be construed so as to take effect in some other manner which will carry the expressed general intention of the parties into effect."—Elphinstone, Deeds, 40. A case illustrating this important rule is *Roe v. Tranmer*, 2 Wils. 75. See also cases in Elphinstone; *Rogers v. Sisters of Charity*, 97 Md. 550; *Carr v. Richardson*, 157 Mass. 576; *Eckman v. Eckman*, 68 Pa. 460, 470; Kales, Estates and Future Interests, 2d ed., § 456.

no proof
of other
consideration.
when
none in
fact.
Rule

CHAPTER IV
DESCRIPTION OF PROPERTY GRANTED

SECTION I

LAND NOT APPURTENANT TO LAND.

ARCHER *v.* BENNETT

1 Lev. 131. 1664.

EJECTMENT, and upon Not guilty, a special verdict: A man seised of a close, on one part whereof was a house, and on another part thereof was a kiln; and also of two mills adjoining to the close; and used and occupied them all together till 1655, when he divided them, and sold the house and a part of the close, and reserved the other part and the kiln, and used them with the mills (and in truth the kiln was a kiln for the drying of oats, and the mills were for the making of oat-meal, but this was not found by the verdict). And afterwards he sold the mills *cum pertinentiis* to the plaintiff: and whether the kiln, and the parts of the close on which they stood, should pass to the plaintiff, was the question. And it was held clearly by the court, that they did not pass; for by the grant of a messuage or lands *cum pertinentiis*, any other land or thing cannot pass, though by the words *cum terris pertinentibus* it would: and gave judgment for the defendant. But by WYNDHAM, Justice, if all the matter had been found, and that the kiln was necessary for the use of the mills, and without which they were not useful, the kiln had passed as part of the mills, though not as appurtenances. As by the grant of a messuage, the conduits and waterpipes shall pass as parcel, though they are remote; to which no answer was given.¹

¹ In *Hill v. Grange*, 1 Plowd. 164 (1557), the question was what passed by a demise of a messuage, with all the lands to the same messuage appertaining. The judges "all argued to the same intent, and agreed unanimously that land could not be appurtenant to a messuage in the true sense of the word *appertaining*. For a messuage consists of two things, viz., the land and the edifice; and before it was built upon it was but land, and then land cannot be appurtenant to land. For a thing of one substance cannot be appurtenant to a thing of the same substance, and when it is built upon then it is a messuage, and consists in a great measure of the same substance that it did before. But the name is changed entirely, so that if the building afterwards falls to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a *toft*, which is a name superior to land, and inferior to messuage; and this name it shall have in respect of the dignity which it once bore. But the chief substance of a messuage is the soil, although the superstructure and the

soil are one entire thing; and then nothing can be appurtenant to another but where it is of another nature and substance. And therefore it was said, there is *hæreditas corporata* and *hæreditas incorporata*. *Hæreditas corporata* is such as messuage, land, meadow, pasture, rents, and the like, which have substance in them, and may continue always. But *hæreditas incorporata* is such as advowsons, villains, ways, commons, courts, piscaries, and the like, which are or may be appendant or appurtenant to inheritances corporate; and such things are and may be termed appurtenances. And Bracton calls the things which are inheritances corporate things corporeal; and after he has treated of corporeal things, he has a chapter concerning appurtenances, wherein he treats of such things corporeal, *ut supra*, which are belonging, appendant, or appurtenant to things incorporeal. But a gross name may contain divers things corporeal, as a manor, monastery, rectory, castle, honor, and the like, are things compound, and may contain altogether messuages, lands, meadows, wood, and such like, and a thing corporeal may be parcel of a gross name, and of a thing compound, but one simple thing corporeal cannot be a parcel of or appurtenant to another simple thing corporeal. As land cannot be parcel of or appurtenant to meadow, nor meadow parcel of or appurtenant to pasture, nor pasture parcel of or appurtenant to wood, nor can land be parcel of or appurtenant to a messuage, nor to any other thing corporeal, for these things are but simple things, which of themselves cannot receive or include other things corporeal. But an advowson, way, estovers, and such like things incorporeal may well enough be appurtenant to a messuage, and so is the difference. And although it is here pleaded that the land had been appurtenant to the messuage from time immemorial, this pleading or averment is to no purpose or effect. For a man cannot aver that to be appurtenant which the law will not suffer to be appurtenant, though usage and continuance may make a law in such things as stand with and are consonant to reason. But in things which are against law and reason, there usage and continuance is to no purpose, as here the pleading or averment that the land has been always appurtenant to the messuage, is an averment that that is law which is not law. And all the four justices agreed unanimously that the averment or pleading that the land has been always appurtenant to the messuage is not good here, and also they agreed that land might not be appurtenant to a messuage in the true and proper definition of an appurtenance. But yet all of them (except BROWN, Justice, who did not speak to this point) agreed that the word (*appertaining* to the messuage) shall be here taken in the sense of *usually occupied* with the messuage, or *lying* to the messuage, for when *appertaining* is placed with the said other words, it cannot have its proper signification, as it is said before, and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with*, or *lying to*, *ut supra*, and being placed with the said other words it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense, it is the office of judges to take and expound the words, which common people use to express their meaning, according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does no stand with the matter, but in such sense as the party intended it. As where a lease was made for life, and after his death that the lands *redibunt* to a stranger, it was taken as *remanebunt*, for to that purpose the party here used it, and therefore, by 18 Ed. 3, it shall be taken by way of a remainder. And so a lease for life, the *reversion* to a stranger, shall be taken for a *remainder*, *causa qua supra*. And many other cases were put where a word shall be taken out of its natural sense, according to the sense intended by the party. So the word (*appertaining*) shall be here taken as *occupied*, *used*, or *lying* with, or to the messuage, and in such sense the averment may serve to declare that the land has been

always occupied with, or has lain to the messuage, and the demise shall serve to convey the same to the defendant, and so the bar is good, notwithstanding the said exception. And that was the opinion of the said three justices. And afterwards it was adjudged accordingly, as appears hereafter by the judgment. And in this argument BROWN and SAUNDERS, Justices, held, that a garden and curtilage are parcels of a messuage: and SAUNDERS said that a dove-house, a mill, and shops may be parcel of a messuage, and shall pass by the name of a messuage" (pp. 170, 171).

In *Hanbury v. Jenkins*, L. R. [1901] 2 Ch. 401, 421, 422, the court was of opinion that one incorporeal hereditament (a way) could be appurtenant to another incorporeal hereditament (a fishery).

SECTION II

BOUNDARIES¹A. *In general.*

PERNAM v. WEAD ✓

6 Mass. 131. 1809.

IN a writ of *entry sur disseisin*, the demandant declared on his own seisin, and on a disseisin by the tenant. The tenant claimed under a levy of an execution extended upon the demandant's land, issued upon a judgment recovered against him by one Edmund Sawyer.

On the trial, which was had before *Sewall, J.*, at the sittings here after the last November Term, upon the general issue, the only question in dispute was, whether the land, which the tenant claimed to hold, was included within the bounds of the land, on which the execution was extended. Upon the evidence, the judge was of opinion with the tenant, and so directed the jury; but they found a verdict for the demandant. The tenant thereupon moved for a new trial, because the verdict was against evidence.

From the report of the judge, it appears that the land on which the execution of Sawyer was extended, was bounded south-westwardly by Drury Lane, thirty-five feet; north-eastwardly by the land of Sanborn and Collins, ninety-nine feet; north-westwardly by other land of the demandant, *about thirty-five* feet, by a line parallel to Drury Lane; and south-westwardly by land of Fletcher, ninety-nine feet; and this parcel is said to contain thirteen rods.

From a plan which had been taken under an order of the court, the line on Drury Lane, extending from the land of Sanborn and Collins to the land of Fletcher, appears to be thirty-five feet three inches and a half; and by the same plan, the line on the demandant's other land appears to be forty-two feet nine and a half inches; and this last extent of line is preserved for twenty-eight feet six inches from the said other land of the demandant towards Drury Lane, where the length of the line is thirty-seven feet three and a half inches.

The demandant insisted that, as there was an over-measure of three and a half inches on one side, he ought to recover on that side a strip of that width the whole length of the parcel extended upon; and as, on the other side, there was an over-measure of five feet six inches, extending twenty-eight feet six inches, in the form of a parallelogram, he ought also to recover that parallelogram. But it was agreed

¹ The topic of Boundaries has been selected as that which furnishes most opportunity for the development of general rules.

that Drury Lane, the land of Sanborn and Collins on one side, and the land of Fletcher on the other side, are all fixed, known monuments, about which there was no dispute; and that there was no question between the parties as to the other land of the demandant's parallel to Drury Lane. The demandant relied not only on the admeasurement, but also on the contents, which gives the tenant thirteen rods and two fifths, instead of thirteen rods, the contents stated in the extent of Sawyer's execution.

There was no argument, and the opinion of the court was delivered to the following effect by

PARSONS, C. J. Upon considering the facts in this case, we have no doubt as to the motion. It must prevail, and a new trial be granted. When the facts were agreed by the parties, or proved at the trial, the result was a mere conclusion of law. And on these points the law has been long settled.

When the boundaries of land are fixed, known, and unquestionable monuments, although neither courses, nor distances, nor the computed contents, correspond, the monuments must govern. With respect to courses, from errors in surveying instruments, variation of the needle, and other causes, different surveyors often disagree. The same observations apply to distances, arising from the inaccuracy of measures, or of the party measuring; and computations are often erroneous. But fixed monuments remain: about them there is no dispute or uncertainty; and what may be uncertain must be governed by monuments, about which there is no dispute.

In the present case, Sanborn and Collins's land on one side, and Fletcher's on the other, are fixed monuments. The land is bounded on them, and must extend in width from one to the other. If the contents had proved less than thirteen rods, yet the tenant could claim only to those monuments; and where the contents are found to be greater, he still shall hold to the same monuments. The jury therefore mistook the law; and the cause must be sent to another jury to correct the mistake.

*New trial ordered.*¹

¹ In *White v. Luning*, 93 U. S. 514, 524, the court said, "It is true, that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call and thus defeat the conveyance." See *Barrataria Co. v. Louisiana Co.*, 146 La. 1001; *Meyer v. Comegys*, 147 La. 851.

In *Kendall v. Green*, 67 N. H. 557, it was held that the measurement of land described in a deed as beginning a certain distance from a house was to be made from the side of the house and not from the edge of the eaves. *Centre Street Church v. Machias Hotel Co.*, 51 Me. 413, accord. *Millett v. Fowle*, 8 Cush. (Mass.) 150, contra. Compare *Meeks v. Willard*, 57 N. J. L. 22.

LERNED v. MORRILL

2 N. H. 197. 1820.

THIS was a writ of entry, in which the demandant counted upon his own seisin within twenty years and upon a disseisin by the tenant.

The cause was tried here at April Term, 1819, upon the general issue, when a verdict was taken for the demandant, subject to the opinion of the court, upon the following facts.

The tenant, by deed dated March 8, 1806, conveyed to the demandant a tract of land described in the deed as follows: "being the westerly part of lot No. 2, and containing 80 acres, beginning at the northwest corner on Boscawen line; then south by Lerner's land to Contoocook river to a poplar tree, thence by said river to a stake and stones, thence northwardly a parallel line with the side line of said lot to a stake and stones on Boscawen line, thence on said Boscawen line to the bound first mentioned." The stakes and stones mentioned in the deed were not erected at the time of making the deed; but about eighteen months afterwards, the parties went upon the premises with a surveyor and chain-men to run out and locate the land, and they erected the stakes and stones at the north-east and south-east corners of the premises. The parties first measured the whole lot, divided it in the middle, and then measured off ten acres from the east half and adjoining the west half, and set up stakes and stones at the north-east and south-east corners of the land so measured off, and ran the line from one stake and stones to the other, and set up stakes and stones at every tally. The tenant immediately cleared his land up to the line and built a fence upon it. The demandant also built a board fence on the line, and the parties occupied and improved the land on each side of that line till 1817. It was proved that the tenant said the demandant bought ten acres more than half the lot. In the fall of 1817, the defendant surveyed the lot, and finding that the demandant had more than eighty acres, removed the fence, and went in to possession of all but eighty acres, and this action is brought to recover the land, of which the tenant thus took possession.

PER CURIAM. The question presented to us in this case for decision, has long been settled, and must now be considered as entirely at rest. Where land has been conveyed by deed, and the description of the land in the deed has reference to monuments, not actually in existence at the time, but to be erected by the parties at a subsequent period: when the parties have once been upon the land and deliberately erected the monuments, they will be as much bound by them, as if they had been erected before the deed was made. In this case, there was a reference in the deed to monuments not actually existing at the time, but the parties soon after went upon the land with

a surveyor, ran it out, erected monuments, and built their fences accordingly; and this is not all. They respectively occupied the land according to the line thus established, for nearly ten years. And there is now no evidence in this case of any mistake or misapprehension in establishing the line. There is no pretence that the tenant could lawfully remove monuments thus deliberately erected and so long acquiesced in. His claim to the demanded premises, for ought that appears in this case, is without any foundation whatever, and there must be

*Judgment for the demandant.*¹

KNOWLES v. TOOTHAKER

58 Maine 172. 1870.

ON report. Writ of entry. Case is fully stated in the opinion.

DICKERSON, J. Writ of entry. Both parties claim title through the same grantor, Henry Smith, who, in the first instance, conveyed "parts of lots numbered 9 and 10, on the east side of Sandy River," to the defendant. After reciting the other boundaries, the description in the deed continues as follows: "thence easterly by a line parallel with the north line of lot No. 9 to the county road," the grantee taking the land north of the line now in dispute, and the grantor retaining the land south of it. The line was run and marked by a surveyor immediately after the conveyance, and the parties then built a fence on it, intending it for a division fence, Smith occupying to the fence on the south, and the defendant on the north side of the fence, for some six years, when Smith conveyed his remaining parcel to the plaintiff's grantor, describing the line in controversy as follows, "to land supposed to be owned by George Toothaker, thence easterly on said Toothaker's south line to the county road." About eight months afterwards, the grantee conveyed the last named premises to the plaintiff, describing it as "the same she purchased of Henry Smith." The plaintiff claims to hold to the line described as running "easterly by a line parallel with the north line of said lot No. 9 to the county road," in Smith's deed to the defendant, which is several rods northerly of the fence, and the defendant claims to hold to the divisional line made by the fence; and the question is, which is the true line between the parties?

The presiding judge ruled that the words, "on said Toothaker's south line," would limit the plaintiff's land to the line established by Toothaker and Smith, on which the division fence was built, and that she could not hold beyond this line, even if she could satisfy the jury that it did not conform to the original lot line; thereupon the parties agreed to submit the question to the law court, judgment

¹ Mistake in locating boundary line, see *Kinne v. Waggoner*, 197 Pac. (Kan.) 195; *Ouzts v. McKnight*, 114 S. C. 303.

to be rendered for the defendant if the ruling is correct; if not, the action is to stand for trial.

But for the acts of the parties in interest, in running, marking, and locating the line, building a fence upon it immediately after the conveyance, and occupying up to it down to the commencement of this suit, the line on the course described in the deed, if it could be ascertained, would be the line between the two parcels. Did these acts fix and establish the divisional line as the true line?

It was early held that where a deed refers to a monument, not actually existing at the time, but which is subsequently placed there by the parties for the purpose of conforming to the deed, the monument so placed will govern the extent of the land, though it does not entirely coincide with the line described in the deed. *Makepeace v. Bancroft*, 12 Mass. 469 (1815); *Kennebec Purchase v. Tiffany*, 1 Greenl. 211 (1821); *Lerned v. Morrill*, 2 N. H. 197 (1820). ✓

Again it was held in *Moody v. Nichols*, 16 Maine, 23 (1839), that when parties agree upon a boundary line, and hold possession in accordance with it, so as to give title by disseisin, such boundary will not be disturbed, although found to have been erroneously established. In that case the call in the deed was "a line extended west, so as to include" a certain number of acres, the boundaries upon the other three sides having been accurately described. The parties to the deed agreed upon and marked that line, erected a fence upon it, and held possession according to it for thirty years.

The same doctrine was held by the Supreme Court of the United States, in giving construction to a line described in the deed as "running a due east course" from a given point. *Missouri v. Iowa*, 6 How. 660.

So the court in Massachusetts, in giving effect to a deed, describing a line as "running a due west course" from a given point, held that the line located, laid out, assented to, and adopted by the parties was the true line, though it varied several degrees from "a due west course." *Kellogg v. Smith*, 1 Cush. 382 (1851).

In *Emery v. Fowler*, 38 Maine, 102 (1854), the call in the deed was a line from a given point, "on such a course . . . as shall contain exactly one and a half acres." The lots to be conveyed were located upon the face of the earth by fixed monuments, erected by referees mutually agreed upon; and the parties to the several conveyances assented to and adopted the location before the deeds were given. Deeds intended to conform to the location thus made were then executed by the parties. The respective grantees entered under the deeds, built fences, and occupied in conformity with the location for fifteen years, when, it being found that more land was contained within the limits of the actual location upon the face of the earth than was embraced within the calls of the deed, a dispute arose. The court held that the monuments thus erected before the deed was given, must control, thus extending the rule adopted in *Moody*

✓ v. *Nichols* to cases where the possession had not been long enough to give title by disseisin. That decision also makes the rule of construction the same, whether the location is first marked and established, and the deed is subsequently executed,¹ intended to conform to such location, or whether monuments, not existing at the time, but referred to in the deed, are subsequently erected by the parties ✓ with like intention.

In construing a deed, the first inquiry is, What was the intention of the parties? This is to be ascertained primarily from the language of the deed. If the description is so clear, unambiguous, and certain, that it may be readily traced upon the face of the earth from the monuments mentioned, it must govern; but when, from the courses, distances, or quantity of land given in a deed, it is uncertain precisely where a particular line is located upon the face of the earth, the contemporaneous acts of the parties in anticipation ✓ of a deed to be made in conformity therewith, or in delineating and establishing a line given in a deed, are admissible to show what ✓ land was intended to be embraced in the deed. It is the tendency of recent decisions to give increased weight to such acts, both on the ground that they are the direct index of the intention of the parties in such cases, and, on the score of public policy, to quiet titles. The ordinary variation of the compass, local attraction, imperfection of the instruments used in surveying, or unskillfulness in their use, inequalities of surface, and various other causes, oftentimes render it impracticable to trace the course in a deed with entire accuracy. If to these considerations we add, what is too often apparent, the ignorance or carelessness of the scrivener in expressing the meaning of the parties, we shall find that the acts of the parties in running, marking, and locating a line, building a fence upon it, and occupying up to it, are more likely to disclose their intention as to where the line was intended to be, when the deed was given, than the course ✓ put down on paper, if there is a conflict between the two.

✓ Hence the rule of law now is, that when, in a deed or grant, a line is described as running from a given point, and this line is afterwards run out and located, and marked upon the face of the earth by the parties in interest, and is afterwards recognized and acted on as the true line, the line thus actually marked out and acted on is conclusive, and must be adhered to, though it may be subsequently ✓ ascertained that it varies from the course given in the deed or grant.

The acts of the defendant and Smith, through whom the plaintiff claims, in surveying and marking the line in dispute upon the face of the earth by stakes and stones and spotted trees, building a fence thereon, intending it to be the line between them, and occupying up to it, make and establish such line as the divisional line between the two lots.

¹ Compare *McKinney v. Doane*, 155 Mo. 287; *Negbauer v. Smith*, 44 N. J. L. 672.

The ruling of the presiding judge was in accordance with this construction of the deeds, and there must be

*Judgment for defendant.*¹

APPLETON, C. J., CUTTING, KENT, BARROWS, and DANFORTH, JJ., concurred.

¹ Compare *Reynolds v. Boston Rubber Co.*, 160 Mass. 240; *Allison v. Kenion*, 163 N. C. 582; *Talbot v. Smith*, 56 Oreg. 117; *Crandall v. Mary*, 67 Oreg. 18; *Savill Bros. v. Betchell*, [1902] 2 Ch. 523.

An agreement to settle an honestly disputed boundary is valid between the parties. Many of the decisions state that the agreement must be acted on. *Jenkins v. Trager*, 40 F. R. 726; *Payne v. McBride*, 96 Ark. 168; *Malone v. Mobbs*, 102 Ark. 542; *Grants Pass Co. v. Brown*, 168 Cal. 456; *Watrous v. Morrison*, 33 Fla. 261; *Farr v. Woolfolk*, 150 Ga. 289; *Adams v. Betz*, 167 Ind. 161; *St. Bede College v. Wefer*, 168 Ill. 324; *Purtle v. Bell*, 225 Ill. 523; *Warden v. Addington*, 131 Ky. 296; *Garvin v. Threlkeld*, 173 Ky. 262; *Turner v. Bowens*, 180 Ky. 755; *Jones v. Pashby*, 67 Mich. 459; *Pittsburgh Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109; *Archer v. Helm*, 69 Miss. 730; *Turner v. Baker*, 64 Mo. 218; *Atchison v. Pease*, 96 Mo. 566; *Barnes v. Allison*, 166 Mo. 96; *Hitchcock v. Libby*, 70 N. H. 399; *Wood v. Bapp*, 169 N. W. (N. D.) 518; *Bobo v. Richmond*, 25 Ohio St. 115; *Hagey v. Detweiler*, 35 Pa. 409; *Cooper v. Austin*, 58 Tex. 494; *Harn v. Smith*, 79 Tex. 310; *Levy v. Maddox*, 81 Tex. 210; *Gwynn v. Schwartz*, 32 W. Va. 487; *Le Comte v. Freshwater*, 56 W. Va. 336.

Contra, *Liverpool Wharf Co. v. Prescott*, 4 All. (Mass.) 22, 7 All. 494.

Compare *Raymond v. Nash*, 57 Conn. 447; *Fredericksen v. Bierent*, 154 Iowa 34; *Hooper v. Herald*, 154 Mich. 529; *Stone v. Clark*, 1 Met. (Mass.) 378; *Jackson v. Dysling*, 1 Caines (N. Y.) 198; *Messer v. Oestreich*, 52 Wis. 684.

For the effect of such agreement on purchasers from the original parties thereto, see *Idaho Land Co. v. Parsons*, 3 Idaho 450; *Osteen v. Wynn*, 131 Ga. 209; *Keen v. Osborne*, 185 Ky. 647; *Iverson v. Swan*, 169 Mass. 582; *Tanner v. Stratton*, 44 Utah 253; *Turner v. Creech*, 58 Wash 439.

In *McKinney v. Doane*, 155 Mo. 287 (1899), a tract of land had been surveyed and stakes set at the corners of the lots. A plat of the tract was recorded and lots were sold by reference to this recorded plat. The plat contained no reference to the stakes. The owner of the tract, A, sold two lots to B and subsequently sold an adjoining lot to C. The court *held* that if, at the time of the sale to B, A pointed out the stakes to B and B took possession of the lots, made improvements and built fences thereon in accordance with the stakes, then, as between A and B and any subsequent grantees having knowledge of the facts, B became the owner of the lots as bounded by the stakes even though the lots as so bounded may not have agreed with the lots as shown on the recorded plat; but that subsequent grantees without knowledge of the facts were not affected. "One who purchases a surveyed lot, or tract of land, without notice of the actual boundary, or corners, has a right to rely upon what appears from the original survey, or plat thereof, and is not bound by monuments which do not appear therefrom to have been placed upon the land."

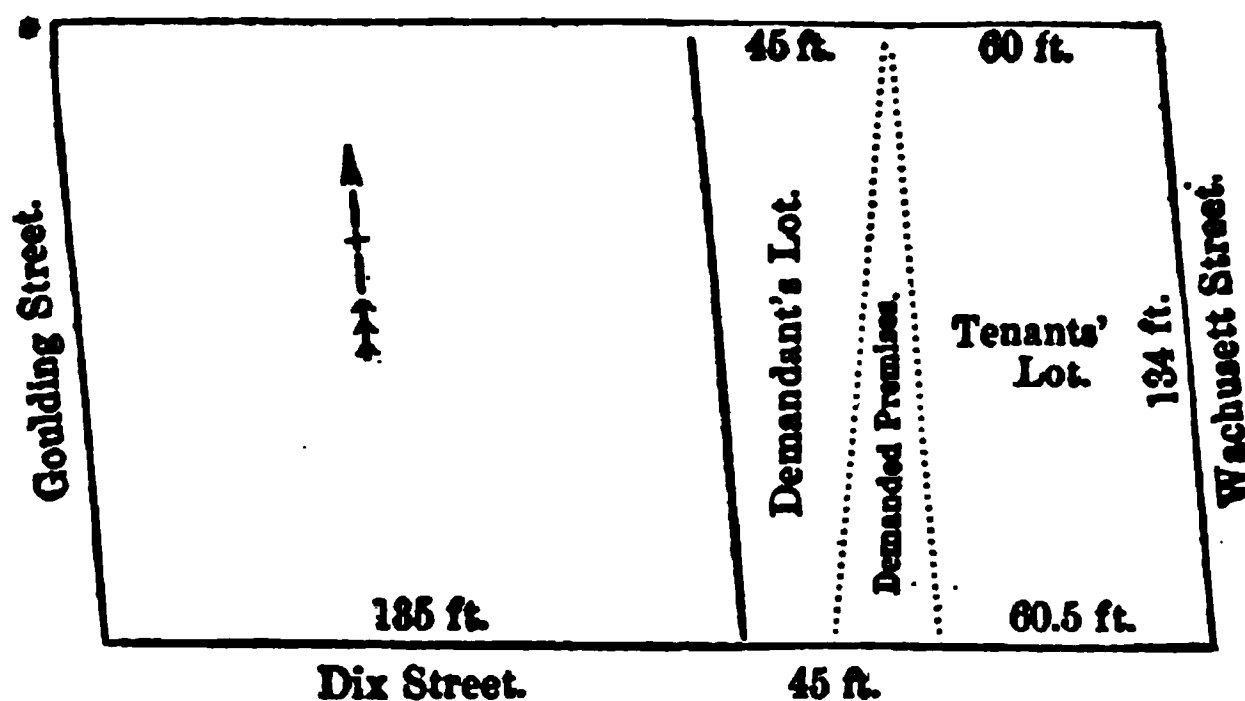
On the effect of acquiescence of adjoining proprietors in the location of a boundary line, see *Long v. Cummings*, 156 Ala. 577; *Price v. De Reyes*, 161 Cal. 484; *Lowndes v. Wicks*, 69 Conn. 15; *Clayton v. Feig*, 179 Ill. 534; *Keller v. Harrison*, 139 Iowa 383; *Dwight v. Des Moines*, 174 Iowa 178; *Brummell v. Harris*, 148 Mo. 430; *Martin v. Hays*, 228 S. W. (Mo.) 741; *Den d. Haring v. Van Houton*, 22 N. J. L. 61; *Dibble v. Rogers*, 13 Wend.

HALL v. EATON AND OTHERS ✓

139 Mass. 217. 1885.

WRIT of entry to recover a lot of land in the city of Worcester. Plea, *Nul disseisin*. Trial in the Superior Court, without a jury, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows:—

The land in dispute was a triangular tract on the northerly side of Dix Street, marked on a plan used at the trial, a copy of which is printed in the margin,* as “Demanded Premises.” It appeared



that all the land lying next northerly of Dix Street and between Wachusett Street on the east and Goulding Street on the west was formerly owned by Henry Goulding, and was divided into lots and sold by his executors. The tenants' lot was at the corner of Dix

(N. Y.) 536; *Hanstein v. Farrell*, 149 N. C. 240; *O'Donnell v. Penney*, 17 R. I. 164; *Young v. Hyland*, 37 Utah 229; *Pickett v. Nelson*, 71 Wis. 542. Compare *Ulman v. Clark*, 100 F. R. 180; *Woodlawn v. Hodson*, 28 Idaho 45; *Shad v. Sharp*, 95 Mo. 573; *Baldwin v. Brown*, 16 N. Y. 359.

On the effect of estoppel of a proprietor to dispute a boundary line which he has recognized, see *Cheaney v. Nebraska Stone Co.*, 41 F. R. 740; *Steidl v. Link*, 246 Ill. 345; *Peterson v. Sohl*, 141 Ind. 466; *Ross v. Ross*, 95 Iowa 604; *Wilson v. Beck*, 160 Iowa, 276; *Titus v. Morse*, 40 Me. 348; *Brewer v. Boston and Worcester Rd. Co.*, 5 Met. (Mass.) 478; *Liverpool Wharf v. Prescott*, 4 All. (Mass.) 22, 7 All. (Mass.) 494; *Iverson v. Swan*, 169 Mass. 582; *Joyce v. Williams*, 26 Mich. 332; *Majors v. Rice*, 57 Mo. 384; *Fitch v. Walsh*, 94 Neb. 32; *Trustees v. Smith*, 118 N. Y. 634; *Galbraith v. Lunsford*, 87 Tenn. 89.

If the real boundary is known, an oral agreement to substitute a new line has been held invalid. *Sharp v. Blankenship*, 67 Cal. 441; *Nathan v. Diersen*, 134 Cal. 282; *Mann v. Mann*, 152 Cal. 23; *Miller v. McGlaun*, 63 Ga. 435; *Olin v. Henderson*, 120 Mich. 149; *Alt v. Butz*, 81 N. J. L. 156; *Vosburgh v. Teator*, 32 N. Y. 561; *Lennox v. Hendricks*, 11 Oreg. 33; *Nichol v. Lytle*, 4 Yerg. (Tenn.) 456; *Lewallen v. Overton*, 9 Humph. (Tenn.) 76; *George v. Collins*, 72 W. Va. 25; *Hartung v. Witte*, 59 Wis. 285. Compare *Lewis v. Ogram*, 149 Cal. 505.

Street and Wachusett Street, and the demandant's lot was part of the lot next westerly, and the question was as to the westerly boundary of the tenants' lot and the easterly boundary of the demandant's lot, under the following deeds:—

On February 20, 1869, Goulding's executors conveyed the corner lot to Blackmer and Kelley (under whom the tenants derive their title), by the following description: "A certain lot of land situated in the city of Worcester, on the westerly side of Wachusett Street and northerly side of Dix Street, bounded and described as follows, to wit: beginning at the southeasterly corner of the lot conveyed, and at the intersection of said streets; thence running northerly by Wachusett Street one hundred and thirty-four feet, to land of the heirs of Henry Goulding; thence running westerly by land of the heirs of said Goulding, sixty feet; thence running southerly by land of said heirs at right angles to said Dix Street one hundred and twenty-five feet to Dix Street; thence running easterly by Dix Street sixty-one feet more or less to the first-mentioned bound, containing 7,770 feet more or less."

On October 8, 1869, said executors conveyed the residue of the land between the tenants' lot and Goulding Street to one King, by a deed which contained the following description: "Lot of land on the northerly side of Dix Street, bounded as follows: beginning at the southeasterly corner of the lot at a corner of land of Kelley and Blackmer and running westerly on Dix Street one hundred and eighty feet to a new street about to be made; thence turning and running northerly on said new street one hundred and twelve and a half feet, to land belonging to the estate of the late Henry Goulding; thence turning and running easterly on the said Goulding estate one hundred and eighty feet, to land of Kelley and Blackmer; thence turning and running southerly on land of said Kelley and Blackmer one hundred and twenty-five feet, to the place of beginning on said Dix Street."

It was agreed that the new street referred to was Goulding Street, and the corner of Goulding Street and Dix Street was a known and fixed bound.

On May 8, 1871, King conveyed to the demandant a part of said lot, forty-five feet wide on Dix Street, bounded as follows: "beginning at the southeasterly corner thereof at corner of land of Kelley and Blackmer, and at a point one hundred and eighty feet distant from the easterly line of Goulding Street, thence northerly on land of Kelley and Blackmer one hundred and twenty-five feet, to land of the estate of Henry Goulding; thence westerly on said land of Goulding forty-five feet; thence southerly and parallel with the first-described line one hundred and twenty-five feet more or less, to said Dix Street; thence easterly on Dix Street forty-five feet, to the place of beginning."

The corner of Dix Street and Wachusett Street was a known and

fixed bound, and the northerly line of Dix Street was a known and fixed line.

✓ If the third line described in the deed of the executors to Blackmer and Kelley is drawn at right angles to Dix Street, it strikes a point on Dix Street eighty feet and fifty-two one-hundredths of a foot from Wachusett Street, and one hundred and sixty-one feet and ninety-four one-hundredths of a foot from Goulding Street. In such case, the tenants' line on Dix Street is eighty feet and fifty-two one-hundredths of a foot in length, and is shown by the westerly dotted line, and their lot contains 9,101 square feet.

✓ If the third line described in said deed to Blackmer and Kelly is drawn so as to strike Dix Street one hundred and eighty feet easterly from Goulding Street, the tenants' line on Dix Street is sixty feet and a half in length, and their lot contains exactly 7,770 square feet.

✓ The demandant offered evidence tending to show that, before the several lots were sold by the executors of Henry Goulding, they prepared a plan of them, which was produced at the trial; and it was testified by one of the executors, that the lots were sold by said plan, but there were no monuments at the corners of the lots when the deeds were given, and there was no evidence that Blackmer and Kelley saw the plan before they took their deed. Said plan showed the tenants' lot to have a line of only sixty feet and a half on Dix Street, and showed that the westerly line did not make a right angle with Dix Street.

The demandant also offered evidence tending to show that, in the year 1876, he erected a fence between his said lot and the tenants' lot (Kelley, who had bought Blackmer's interest, then being the owner of the tenants' lot), and by Kelley's consent it was placed on the line as claimed by the demandant, and remained there several years, and until removed by the tenants a short time before this suit was brought.

✓ The demandant asked the judge to rule that it was a question of fact, on all the evidence, whether the tenants' westerly line was to be drawn at right angles to Dix Street, and asked a finding in fact that it was to be drawn at an angle to said Dix Street, so as to strike said street sixty and a half feet from Wachusett Street. The judge ruled, as matter of law, that the said line was to be drawn at a right angle to Dix Street, without regard to the evidence outside of the deeds; and found for the tenants. The demandant alleged exceptions.

W. ALLEN, J. The courses of the lines on Wachusett Street and Dix Street are fixed on the land, and fix the angle contained by them. There is nothing on the land to fix the course of the second or of the third line, for it does not appear that the line of the land of the heirs of Henry Goulding mentioned is fixed. The description in the deed gives the length of the first, second, and third lines, which there is nothing to control, and the angle contained by the third and fourth

lines. There is no difficulty in locating this description upon the land, and it makes the length of the fourth line eighty feet and fifty-two one-hundredths of a foot, and the contents of the lot 9,101 square feet. The description in the deed gives the length of the fourth line as "sixty-one feet more or less," and the contents of the lot as "7,770 feet more or less." This discrepancy of one third in length of the front line of the lot, and one fifth in its contents, could not have been intended, although the length and dimensions are only approximately given, and it is obvious that there is a mistake, either in the angle given, or in the length of the fourth line.

We do not regard the statement of the quantity of the land as very material. It is the computation of the contents of the figure described in the deed, but which cannot be produced on the land. The fact that to give exactly the quantity of land mentioned when the other particulars of the description are applied to the land, the third line must intersect the fourth at an obtuse angle, and the fourth line must be sixty feet and a half in length, goes to show, what is otherwise sufficiently apparent, that no such discrepancy in the length was intended. There was a mistake either in the angle given or in the length of the fourth line; they cannot both be applied to the land, though either of them may be, and the question is which must be rejected.

The question to be determined is the intention shown in the language of the deed, in the light of the situation of the land and the circumstances of the transaction, and sometimes with the aid of declarations and conduct of the parties in relation to the subject-matter. The rule that monuments, in a description in a deed, control courses and distances, is founded on the consideration that that construction is more likely to express the intention of the parties. The intention to run a line to a fixed object is more obvious, and the parties are less likely to be mistaken in regard to it than in running a given distance or by a given course. But, where the circumstances show that the controlling intention was otherwise, the rule is not applied. *Davis v. Rainsford*, 17 Mass. 207. *Parks v. Loomis*, 6 Gray, 467. *Chapman v. Murdock*, 9 Gray, 156. So far as the question is as to the relative effect to be given to a course and a distance, neither has in itself any advantage over the other as showing a governing intent. Whether the one in a given case shall outweigh the other, as showing the intention of the parties, must depend upon the circumstances existing at the time.

The angle formed by Dix Street and Wachusett Street is an acute angle; the lot was a corner lot, the front on Dix Street. In laying it out, it would be natural either to have the third line in the description parallel to Wachusett Street, or at a right angle with Dix Street. The latter is for the advantage of the purchasers. The deed shows that the parties had that, and not the other, in mind. Not only is the third line not said to be parallel with Wachusett Street, but it

appears that it was not intended to be. The parties understood that the angle at the corner of the streets was an acute angle, and that making the other angle on Dix Street a right angle would require the line on that street to be longer than the rear line, and they said that the angle should be a right angle, and therefore that the line should be longer. It was not merely giving a course to the third line, but it was expressly fixing the shape of the lot. The length of the fourth line was left indefinite, and to be determined by the angle which was fixed. It is true that the given angle requires a longer line than was supposed; but the angle and the shape of the lot, and not the length of the line, appear to have been the controlling considerations. See *Noble v. Googins*, 99 Mass. 231.

It is contended by the plaintiff, that it is a case of latent ambiguity, which may be explained by parol evidence. If the difference were between a given course of the third line and measurement of the fourth, it might present such a case, but neither is given. The course of the third line was not run, but it was to intersect Dix Street at a right angle; the fourth line was not measured, but its length was estimated, and apparently estimated as the distance between the point where the third line must meet Dix Street to form a right angle with it and the first corner. A mistake was made in the estimate of the distance. It would seem that the angle was so material a particular in the description of the lot, that the expressed intention in regard to it could not be made doubtful by a mistake in the estimate of the length of the fourth line, which was determined by it; but it is not necessary to decide this. As the case stood at the trial, and upon the evidence offered, the court properly ruled that, as matter of law, the third line was to be at a right angle with Dix Street, without regard to the evidence outside the deed.

The plaintiff relied upon evidence that the executors of Goulding, before the lot was sold, made a plan of this and other lots, by which it appeared that the fourth line was sixty feet and a half in length, and that the angle formed by the third line and Dix Street was an obtuse angle. This plan is not referred to in the deed, and was not seen by the purchasers. The only effect of this evidence would be to show that the grantors knew that the lot described in the deed did not correspond with the one on the plan, and did not inform the grantees.

Eight months after the conveyance to Blackmer and Kelley, the executors conveyed to one King the adjoining lot on Dix Street, extending westerly to a way to be laid out, called Goulding Street, bounding easterly on the land of Blackmer and Kelley and the line on Dix Street, and the rear lines being each one hundred and eighty feet in length. This evidence may tend to show that the executors intended that the third line of the Blackmer and Kelley lot should be parallel with Goulding Street, but such intention was not known to Blackmer and Kelley, and was not expressed or indicated in the

deed to them. The demandant also relied upon evidence that King afterwards conveyed to the demandant a lot adjoining Blackmer and Kelley, described as beginning at a corner of their land on Dix Street one hundred and eighty feet from Goulding Street, and that several years after, and seven years after the conveyance to Blackmer and Kelley, and after Kelley had acquired Blackmer's interest, the demandant put up a fence between his lot and Kelley's, and, with Kelley's consent, put it on the line now claimed by the demandant, where it remained for several years.

We do not see that any of this evidence is competent to control the construction indicated by the deed itself. It is not sufficient to show a practical construction of the deed by the parties to it, nor an admission by the tenants' grantor which can bind the tenants, nor a mutual agreement as to the boundary, and occupation accordingly. See *Liverpool Wharf v. Prescott*, 7 Allen, 494; *Miles v. Barrows*, 122 Mass. 579; *Lovejoy v. Lovett*, 124 Mass. 270. Whether evidence of the construction of the deed by the acts of the parties by locating the third line on the land, or fixing the point of its intersection with Dix Street by a monument or otherwise, would present a question for the jury, we need not consider, because the evidence offered was not sufficient to show such acts, and the question presented was one of law upon the construction of the deed.

A majority of the court are of opinion that the ruling excepted to was correct.

*Exceptions overruled.*¹

B. *On Water*

STARR v. CHILD.

20 Wend. (N. Y.) 149; 4 Hill (N. Y.) 369. 1838, 1842.

THIS was an action of ejectment, tried at the Monroe Circuit in October, 1835, before the *Hon. Addison Gardiner*, then one of the circuit judges.

¹ In *Preston v. Bowmar*, 6 Wheat. (U. S.) 580, 582, Mr. JUSTICE STORY said: "It may be laid down as a universal rule, that course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one or the other. Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances."

In *Kruse v. Scripps*, 11 Ill. 98, 103, the court said: "If a tract of land is conveyed by metes and bounds, or any other certain description, the grantee takes all of the land included within the designated limits, although the quantity may exceed what is stated in the deed; and he is restricted to those limits, if the quantity turns out to be less than is represented. The statement of quantity is considered as the most uncertain part of the description, and when inconsistent with boundaries, courses or distances, must be rejected."

The plaintiffs claimed title to the premises in question on the following state of facts: It was admitted that previous to the 13th August, 1817, Charles Carroll, William Fitzhugh and Nathaniel Rochester were seised of a tract of 100 acres of land covering the premises in question, and that both plaintiffs and defendants claim under that title. The plaintiffs then produced in evidence, 1. A *partition deed* between Carroll, Fitzhugh and Rochester of the above tract, bearing date 13th August, 1817, by which *mill-seat lot number twelve* (the premises in question), among other parcels, was allotted to Rochester; 2. A second partition deed between the same parties, bearing date 19th September, 1822, whereby certain alterations were made in the *numbers and size* of various mill-seat lots; and other mill-seats laid out and divided between them; 3. A deed from Rochester to William Cobb, bearing date 9th November, 1819, conveying "All that certain piece or *parcel of mill-seat lot No. 12* in the village of Rochester, beginning at the northwest corner thereof *on the south bounds of Buffalo Street*, running thence southwardly along the east bounds of the mill-yard and at right angles with Buffalo Street 30 feet; thence eastwardly parallel with Buffalo Street *about 45 feet to the Genesee River*; thence northwardly *along the shore of said river to Buffalo Street*; thence along the south bounds of Buffalo Street westwardly to the place of beginning: *together with the privilege of taking water from the present mill-race* near the mill now occupied by Bissel & Ely; such water to be conveyed in front of and near the said mill and *below the surface of the ground*, to be kept well covered so as not to obstruct the passage and use of the mill-yard, &c. &c. (prescribing the quantity of water to be used; giving a right in common to the use of the *mill-yard* fronting the mill occupied by Bissel & Ely and extending to the said lot number *twelve*; and subjecting the grantee to a proportion of the *expense of repairs* on the dam and race-way, &c. &c.); and 4. The plaintiffs produced in evidence a deed from the said Nathaniel Rochester to *Thomas Morgan* bearing date on the same day with the deed last mentioned, conveying the *residue* of the said mill-seat lot No. 12 to the grantee, in which the premises conveyed are described as beginning at the *southwest corner* of the premises conveyed to Cobb, running thence southwardly along the east bounds of the mill-yard 25 feet; "thence eastwardly along the north bound of an alley and parallel with Buffalo Street *to the Genesee River* (nearly fifty feet); *thence northwardly along the shore of the Genesee River* to William Cobb's corner;" thence to the place of beginning. "*Together with the privilege of taking water from the present mill-race,*" &c. &c. (containing the same provisions as in the deed to Cobb.) After the production of those deeds, the plaintiffs deduced a regular title under the same to themselves. The judge charged the jury that upon a true construction of the deeds executed by Rochester to Cobb and Morgan, the grantee *had obtained title to the centre of the*

Genesee River, and that title having become vested in the plaintiffs, he directed the jury to find a verdict for them, which they did according to such direction.¹

WALWORTH, CHANCELLOR. The decision of a majority of this court in the case of *The Canal Appraisers v. The People ex. rel. Tibbitts*, 17 Wend. 590, although put upon other grounds by some of the members who voted for a reversal of the decision of the Supreme Court, cast a shade of doubt upon the question whether the common law rule prevailed here as to the construction of conveyances of lands bounded by or upon a river or stream above tide waters. That doubt, however, is probably removed by the recent decision of this court in the case of *The Commissioners of the Canal Fund v. Kempshall*, 26 Wend. Rep. 404, in which the judgment of the Supreme Court in favor of the riparian owner was unanimously affirmed. The common law rule, as I understand it, is that the riparian proprietor is *prima facie* the owner of the *alveus* or bed of the river adjoining his land, to the middle or thread of the stream; that is, where the terms of his grant do not appear and show that he is limited. And when by the terms of the grant to the riparian proprietor he is bounded upon the river generally as a natural boundary, or, in the language of Pothier, where the grant to the riparian proprietor has no other boundary on the side thereof which is adjacent to the river but the stream itself, the legal presumption is that his grantor intended to convey to the middle of such stream; subject to the right of the public to use the waters of the river for the purposes of navigation in their accustomed channel, where they are by nature susceptible of such use. It has also been decided that the same principle applies to the construction of grants bounded generally upon highways, party-walls, ditches, &c., which constitute natural boundaries between the lands granted and the adjacent property. Thus, in *Jackson v. Hathaway*, 15 John. Rep. 454, although by the terms of the grant in that case the Supreme Court considered the whole of the highway as excluded, Mr. Justice Platt, who delivered the opinion of the court, says: "Where a farm is bounded *along* the highway, or *upon* a highway, or as *running to* a highway, there is reason to intend that the parties meant the middle of the highway." So in *Warner v. Southworth*, 6 Conn. Rep. 471, 474, where the grantor had divided one of his lots from another by an artificial ditch and embankment, and afterwards conveyed one of those lots by a deed which bounded it upon the ditch generally, without any words of restriction, the Court of Errors in our sister State of Connecticut decided that the grant extended to the middle of the ditch. And Judge Daggett, in delivering the opinion of the court in that case, says: "Doubtless

¹ The defendants, having excepted to the charge of the judge, moved in the Supreme Court for a new trial. This motion was denied, and the case was then brought by writ of error before the Court for the Correction of Errors. Only the opinion of WALWORTH, C., is given.

had the boundary line been a stone wall, six feet in width at the bottom, the grant would have extended to the centre of it." (See also 3 Kent's Com. 432.)

Although this principle exists as to the construction of grants which are unrestricted in their terms, and also as to the legal presumption of ownership by the riparian proprietor where from lapse of time or otherwise the terms of his grant from the former or original proprietors cannot be ascertained, there can be no doubt of the right of the general owner of the bed of the river, as well as of the land upon its banks, so to limit or restrict his conveyance of the one as not to divest himself of his property in the other. Lord Chief Justice Hale, in his learned treatise *De Jure Maris, &c.*, admits that the *prima facie* presumption of ownership of the bed of the stream by the riparian proprietor may be rebutted by evidence that the contrary is the fact. He says, "one man may have the river and others the soil adjacent, or one may have the river and soil thereof, and another the free or several fishing in that river." (See Harg. Law Tr. 5.) And the learned and venerable commentator upon the American law says, it is competent for the riparian proprietor to sell his upland to the top or edge of the bank of a river, and to reserve the stream or the flats below high water-mark, if he does it by clear and specific boundaries. (3 Kent's Com. 434.) This was also expressly decided by Mr. Justice Washington in the Circuit Court of the United States for the Third Circuit, in the case of *Den v. Wright*, Peter's C. C. Rep. 64, where the owner of the *alveus* or bed of the creek, and also of the adjacent land upon the south bank thereof, had conveyed 29 acres in the bed of the creek, bounded by the sides of the same, without any of the land upon either of the adjacent banks. In the case of *Dunlap v. Stetson*, 4 Mason's Rep. 349, in the Circuit Court of the United States for the First Circuit, where the lands granted, instead of being bounded on the Penobscot River generally, were described as commencing at a stake and stones on its west bank, and after running on the other sides of the lot certain courses and distances to another stake and stones on the same bank of that river, and thence *upon the bank at high water-mark*, to the place of beginning, Judge Story decided, that the flats between high and low water-mark were not conveyed by the deed; although by a colonial ordinance, which was recognized as the existing law of the State, grants bounded generally upon tide waters carried the grantee to low water-mark. A similar decision was made by the Supreme Court of Massachusetts in the case of *Storer v. Freeman*, 6 Mass. 435. In that case one of the conveyances described the lines as running to the *shore* of Gamaliel's Neck, and thence *by the shore, &c.* And in the other deed these lines were described as running to a heap of stones *at the shore* of the neck, and thence *by the shore* to the land conveyed by the first deed. And in the case of *Hatch v. Dwight*, 17 Mass. R. 298, the same court decided

that where land was bounded by the *bank* of a stream, it necessarily excluded the stream itself. In delivering the opinion of the court in that case, Parker, C. J., says, that the owner may undoubtedly sell the land without the privilege of the stream, "as he will do if he bounds his grant by the bank."

Running to a monument standing on the bank, and from thence running *by the river* or *along the river*, &c., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the directions of the lines *to the river*, and not as restricting the boundary *on the river*.¹ If the grantor, however, after giving the line to the river, bounds his land by the *bank* of the river, or describes the line as running *along the bank* of the river, or bounds it upon the *margin* of the river, he shows that he does not consider the whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river. And it appears to me equally clear that the grant is restricted where it is bounded by the *shore* of the river, as in the present case.

The shore of tide water is that portion of the land which is alternately covered by the water and left bare by the flux and reflux of the tide. Properly speaking, therefore, a river in which the tide does not ebb and flow has no *shores*, in the legal sense of the term. It has *ripam*, but not *littus*. The term "shores," however, when applied to such a river, means the river's banks above the low watermark; or rather, those portions of the banks of the river which touch the margin or edges of the water of the stream. A grant, therefore, which is bounded by the *shore* of a fresh-water river, conveys the land to the water's edge, at low water; and, as in the case of lands bounded upon tide waters, that boundary of the grant is liable to be changed by the gradual alterations of the shore by alluvial increment, or the attrition of the water.

The fact that the premises conveyed in this case are described in the deeds as mill-lots, cannot operate to extend the grants into the *alveus* or bed of the river. For the deeds also show that the contemplated mills were to be supplied with water from the mill-race already constructed; and not by water to be taken out of the Genesee River, opposite the lots granted. And the right to discharge the water into the river, after it has been used to propel the machinery on the mill-lots, is at most but an easement; not requiring for its enjoyment the ownership of any part of the bed of the stream by the grantees. Upon the question, therefore, whether the bed of the river passed by those deeds, I concur with Mr. Justice Bronson, in the opinion given by him in the court below, dissenting from the conclusion at which his two associates on the bench had arrived.

For that reason I shall vote to reverse the judgment of the Supreme

¹ So *Cold Spring Iron Works v. Tolland*, 9 Cush. (Mass.) 492; *Kent v. Taylor*, 64 N. H. 489; *Simmons v. Paterson*, 84 N. J. Eq. 23; *Luce v. Carley*, 24 Wend. (N. Y.) 451.

Court, and to award a *venire de novo*; to the end that the jury may ascertain the part of the premises in controversy above ordinary low water-mark, if any, which was in possession of the defendants in the court below at the time of the commencement of this suit. And if a majority of the court should concur with me in supposing that the judgment which was rendered by the Supreme Court should be reversed, it appears to be a case where the costs of this writ of error may very properly be left to abide the event of the suit upon the *venire de novo* which must then be awarded.

On the question being put, "Shall this judgment be reversed?" the members of the court voted as follows:—

For reversal: The PRESIDENT, the CHANCELLOR, and *Senators* CLARK, ELY, FRANKLIN, PECK, ROOT, SCOTT, STRONG, VARIAN, and VARNEY — 11.

For affirmance: *Senators* BARTLIT, BOCKEE, DENNISTON, DIXON, HUNT, JOHNSON, NICHOLAS, PLATT, RUGER, and WORKS — 10.

*Judgment reversed.*¹

SLEEPER v. LACONIA

60 N. H. 201. 1880.

APPEAL, from the award of damages by the selectmen, for land taken for a highway. Facts found by referees, who awarded that the plaintiff should recover \$400 if the title of the plaintiff extended to the centre of the Winnipiseogee River. He derived his title through one Reeves from Baldwin, who was bounded by the river. The description of the land, as given in the deed from Baldwin to Reeves, and in the deed from Reeves to the plaintiff, so far as material to determine the question raised, is as follows: "thence northwesterly on the line of Baldwin's land to the river, thence northeasterly on the river shore to Church Street." When the plaintiff purchased his lot, there was between the high ground on his lot and the main channel of the river a low piece of ground covered with water. It was over this low ground that the highway was partly laid.

The referee rejected evidence offered by the defendants to show that at the time Baldwin conveyed to Reeves it was verbally agreed between him and Baldwin that the shore of the river should be the boundary of the lot; and the defendants excepted.

STANLEY, J. Baldwin once owned the premises in question. His line extended to the river, "thence on the river," &c. This gave him

¹ And see *Rockwell v. Baldwin*, 53 Ill. 19; *Brophy v. Richeson*, 137 Ind. 114; *Murphy v. Copeland*, 51 Iowa 515; *Bradford v. Cressey*, 45 Me. 9; *Whittier v. Parmenter Ice Co.*, 90 Vt. 16; *Allen v. Weber*, 80 Wis. 531.

Compare *Hanlon v. Hobson*, 24 Colo. 284; *Morrison v. Keen*, 3 Greenl. (Me.) 474; *Harlow v. Fisk*, 12 Cush. (Mass.) 302.

the soil to the thread of the stream. *State v. Gilmanton*, 9 N. H. 461; *Greenleaf v. Kilton*, 11 N. H. 530; *State v. Boscawen*, 28 N. H. 217; *Nichols v. Suncook Mfg. Co.*, 34 N. H. 345, 349; *Kimball v. Schoff*, 40 N. H. 190; *Bradford v. Cressey*, 45 Me. 9. Running the line to the river does not restrict the grant to bank or shore of the river. The river is the monument, and, like a tree, a stake, a stone, or any other monument, controls the distance, and is to be considered as located equally on the land granted and the land of the adjoining owner. The centre of the monument is the boundary, and the grant extends to that point. ✓

These views are not controverted, but the defendants contend that the clause in the deed from Baldwin to Reeves and from Reeves to the plaintiff, "thence north-easterly on the river shore," limits and restricts the grant to the bank or shore of the river. In *Woodman v. Spencer*, 54 N. H. 507, this question was considered in respect to land bounded by a highway, and it was there held that the expressions "on the highway," and "by the side of the highway," were identical in meaning and effect; and this view is fully sustained by *Dovaston v. Paine*, 2 Sm. L. C. H. & W., notes 213, 217, 232, 234, 235, 237, 238; *Motley v. Sargent*, 119 Mass. 231; *Peck v. Denniston*, 121 Mass. 17; *O'Connell v. Bryant*, 121 Mass. 557. The rule is a presumed understanding of the parties that the grantor does not retain a narrow strip of land under a stream or other highway, because the title of it left in him would generally be of little use, except for a purpose of annoyance and litigation.

The evidence as to the agreement between Baldwin and Reeves tended to contradict the deed, and was properly excluded. *Goodeno v. Hutchinson*, 54 N. H. 159.

Judgment on the report for the plaintiff for \$400.

FOSTER, J., did not sit; the others concurred.¹

¹ Compare *Railway Co. v. Platt*, 53 Ohio St. 254; *Norcross v. Griffiths*, 65 Wis. 599; *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133.

The ordinary rule that land on a river is bounded by the middle of the stream is not affected by the fact that the land consists of town lots. *Watson v. Peters*, 26 Mich. 508; *Arnold v. Elmore*, 16 Wis. 509.

The rules are the same on an artificial as on a natural stream. *Warner v. Southworth*, 6 Conn. 471; *Agawam Canal Co. v. Edwards*, 36 Conn. 476.

In *Lowell v. Robinson*, 16 Me. 357, a mill-dam had been constructed in a river, and land had been conveyed bounded on the mill-pond so formed. Held, that the grantee took to the centre of "stream thus flowed." Compare *Boardman v. Scott*, 102 Ga. 404, 417.

In *Mill River Mfg. Co. v. Smith*, 34 Conn. 462, it was held that where land in a deed was bounded by an artificial pond formed by the erection of a dam across a stream the grantee took to the middle of the original stream as if no pond existed. And see *Providence Club v. Miller Co.*, 117 Va. 129.

The grantee of land bounded by a natural pond takes to the centre. *Hardin v. Jordan*, 140 U. S. 371; *Gouveneur v. National Ice Co.*, 134 N. Y. 355; *Lembeck v. Nye*, 47 Ohio St. 336. Contra, *School Trustees v. Schroll*, 120 Ill. 509; *Kanouse v. Slockbower*, 48 N. J. Eq. 42. Compare *Patapsco Guano Co. v. Bowers-White Lumber Co.*, 146 N. C. 187.

C. *On Ways*

NOTE

Rule "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the thing so running over or standing on the land is the boundary of the lot granted." *Per* Gray, J., *Boston v. Richardson*, 13 All. (Mass.) 146, 154, 155.

Rule Where the grantor owns to the centre of a public way a conveyance of land bounded "by," or "on," or described as running "along" the highway will carry the grant to the centre of the highway, unless a contrary intention appear on the deed. *Sibley v. McCool*, 86 Ga. 1; *Blalock v. Atwood*, 154 Ky. 394; *White v. Godfrey*, 97 Mass. 472; *McCarthy v. Everett*, 234 Mass. 231; *Haberman v. Baker*, 128 N. Y. 253; *Cronin v. Janesville T. Co.*, 163 Wis. 436. And see *Helmer v. Castle*, 109 Ill. 664. This presumption was rebutted in *Hobson v. Philadelphia*, 150 Pa. 595 and in *Pryor v. Petre*, [1894] 2 Ch. 11. Compare *Fraser v. Ott*, 95 Cal. 661; *Dodd v. Witt*, 139 Mass. 63.

Even though the length of the boundary lines would carry the granted premises only to the edge of the way. *Moody v. Palmer*, 50 Cal. 31; *Oxton v. Groves*, 68 Me. 371; *Newhall v. Ireson*, 8 Cush. (Mass.) 595. Compare *Wegge v. Madler*, 129 Wis. 412; *Commissioners v. Central Ry. Co.*, [1913] A. C. 364.

Rule And the rule is the same where land abutting on such way is conveyed without mentioning the way. *Champlin v. Pendleton*, 13 Conn. 23; *Gear v. Barnum*, 37 Conn. 229; *Cox v. Louisville Rd. Co.*, 48 Ind. 178; *Grant v.*

In *Bradley v. Rice*, 13 Me. 198, land was bounded by a pond, which, at the time of the conveyance, was raised to an artificial height by a dam. *Held*, that the grantee was entitled to the land only to the margin as it existed at the time of the conveyance, and not as it would be in its natural state. In *Paine v. Woods*, 108 Mass. 160, land was bounded by a pond, which, at the time of the conveyance was raised to an artificial height by a dam. For many years it had been the usage of the owners of the dam to open sluiceways therein during several months of each year, and the pond in those months was reduced to its natural state. *Held*, that the grantee was entitled to the land to the low water mark of the pond in its natural state.

In *Halsey v. McCormick*, 13 N. Y. 296, land was bounded by the bank of a creek. The judge below charged that the bank "was that line to which the water would flow when it was ordinary high water in spring and fall." *Held*, error. The grantee was entitled to the water's edge at low water. *Murphy v. Copeland*, 58 Iowa 409, *accord*. See also *Stone v. Augusta*, 46 Me. 127; *Stevens v. King*, 76 Me. 197; *Yates v. Van De Bogert*, 56 N. Y. 526; *Lamb v. Ricketts*, 11 Ohio 311; *Palmer v. Farrell*, 129 Pa. 162; *Wrathall v. Miller*, 51 Utah 218.

On bounding "by the shore" in Massachusetts and Maine, where private ownership extends to low water, see *Dunlap v. Stetson*, 4 Mason, (U. S.) 349, 365; *Brown v. Heard*, 85 Me. 294; 9 Gray (Mass.) 524, note; *Litchfield v. Scituate*, 136 Mass. 39, 48; *Haskell v. Friend*, 196 Mass. 198.

Moon, 128 Mo. 43; *Durbin v. Roanoke Bldg. Co.*, 107 Va. 753; *Kneeland v. Van Valkenburgh*, 46 Wis. 434; *Berridge v. Ward*, 10 C. B. N. S. 400. But see *Hanson v. Campbell*, 20 Md. 223; *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 13.

On the effect of a change in the location of the highway after the making of the conveyance, see *Williams v. Johnson*, 149 Ky. 409; *White's Bank v. Nichols*, 64 N. Y. 65.

A conveyance describing land as bounded by the "side," "margin," "edge," or "line" of a highway, ~~to the centre of which the grantor owns the fee~~, has been held not to pass that portion of the highway. *Warden v. South Pasadena Co.*, 178 Cal. 440 (statute); *Hamlin v. Att'y Gen'l*, 195 Mass. 309; *Grand Rapids Rd. Co. v. Heisel*, 38 Mich. 62; *Betcher v. Chicago Milw. Ry. Co.*, 110 Minn. 228; *Hughes v. Providence Rd. Co.*, 2 R. I. 508; *Railroad v. Bingham*, 87 Tenn. 522; *Buck v. Squiers*, 22 Vt. 484; *Cole v. Haynes*, 22 Vt. 588. Compare *O'Connell v. Bryant*, 121 Mass. 557; *Matter of City of New York*, 209 N. Y. 344. Contra, *Helmer v. Castle*, 109 Ill. 664; *Woodman v. Spencer*, 54 N. H. 507; *Paul v. Carver*, 26 Pa. 223; *Cox v. Freedley*, 33 Pa. 124; *Kneeland v. Van Valkenburgh*, 46 Wis. 434. Compare *Anthony v. Providence*, 18 R. I. 699.

If a monument or point on the side of a highway is designated as the starting point or the terminus of a boundary line running along the highway the authorities are divided as to whether the portion of the way owned by the grantor passes. That it does pass, see *Low v. Tibbetts*, 72 Me. 92; *White v. Godfrey*, 97 Mass. 472; *Peck v. Denniston*, 121 Mass. 17; *Dean v. Lowell*, 135 Mass. 55; *McKenzie v. Gleason*, 184 Mass. 452; *Salter v. Jonas*, 39 N. J. L. 469; *Van Winkle v. Van Winkle*, 184 N. Y. 193; *Cox v. Freedley*, 33 Pa. 124; *Marsh v. Burt*, 34 Vt. 289. That it does not pass, see *Peabody Co. v. Sadler*, 63 Md. 533; *Hunt v. Brown*, 75 Md. 481; *Sibley v. Holden*, 10 Pick. (Mass.) 249; *Smith v. Slocum*, 9 Gray (Mass.) 36; *Kings County Insurance Co. v. Stevens*, 87 N. Y. 287. Compare *Hoboken Land Co. v. Kerrigan*, 31 N. J. L. 13.

The following cases hold that the rules as to conveyances of land bordering on a private way, or on land intended to be dedicated in the future as a highway, are the same as in the case of a public way. *Fisher v. Smith*, 9 Gray (Mass.) 441; *Stark v. Coffin*, 105 Mass. 328; *Motley v. Sargent*, 119 Mass. 231; *Gould v. Eastern Rd. Co.*, 142 Mass. 85; *Bissell v. N. Y. Central Rd. Co.*, 23 N. Y. 61; *Matter of Ladue*, 118 N. Y. 213; *Saccone v. West End Trust Co.*, 224 Pa. 554 (private alley) [but see in the case of an unopened street *Clymer v. Roberts*, 220 Pa. 162, 164]. See *Morgan v. Moore*, 3 Gray (Mass.) 319; *Codman v. Evans*, 1 All. (Mass.) 443; *Clark v. Parker*, 106 Mass. 554. Contra, *Seery v. Waterbury*, 82 Conn. 567; *Bangor House Proprietary v. Brown*, 33 Me. 309; *Mott v. Mott*, 68 N. Y. 246 (semble); *Leigh v. Jack*, 5 Exch. D. 264. Compare *Brown v. Taber*, 103 Iowa 1; *White v. Jefferson*, 110 Minn. 276; *Empenger v. Fairley*, 110 Minn. 186.

A, owner of a tract of land, laid it out in village lots. The streets therein were uniformly eighty feet in width, except one street on the margin of the tract which was only forty feet in width. A sold to B lots bounded on the marginal street. Neither A nor B owned the land upon the opposite side. Held, that B acquired the fee of the whole of that portion of the street upon which his lots bounded. *In re Robbins*, 34 Minn. 99. *Haberman v. Baker*, 128 N. Y. 253, accord. Contra, *Gould v. Wagner*, 196 Mass. 270. Compare, where the ownership of the way confers riparian rights, *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Delachaise v. Maginnis*, 44 L. Ann. 1043; *Brisbane v. St. Paul & S. C. Rd. Co.*, 23 Minn. 114; *Ocean City Hotel Co. v. Sooy*, 77 N. J. L. 527; *Johnson v. Grenell*, 188 N. Y. 407; *Geddes Salt Co. v. Niagara Power Co.*, 207 N. Y. 500; *Gifford v. Horton*, 54 Wash. 595.

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CHAPTER V

ESTATES CREATED

SECTION I

ESTATES IN FEE SIMPLE

LIT. § 1. Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. *Quia feodum idem est quo hæreditas, et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hæreditas legitima, vel hæreditas pura.* For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him forever: or by these words, To have and to hold to him and his assigns forever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

Co. LIT. 8 b. And it is to be observed, that every word of Littleton is worthy of observation. First (heirs) in the plural number; for if a man give land to a man and to his heir in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case his heir shall take nothing.¹ Also observable is this conjunctive (*et*). For if a man give lands to one, To have and to hold to him *or* his heirs, he hath but an estate for life, for the uncertainty.² . . . Here Littleton treateth of purchases by natural persons, and not of bodies politic or corporate; for if lands be given to a sole body politic or corporate (as to a bishop, parson, vicar, master of an hospital, &c.), there to give him an estate of inheritance in his politic or corporate capacity, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance; for as the heir doth

¹ See Harg., note *ad loc.*; Elphinstone, Deeds, Rule 67, Obs.

² "As to the construction contended for, although it is supported by a *dictum* of Lord Coke's, it is a strictness not to be tolerated at the present day." *Per* SEWALL, J., in *White v. Crawford*, 10 Mass. 183, 188 (1813).

inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. But it appeareth here by Littleton, that if a man at this day give lands to I. S. and his successors, this createth no fee simple in him; for Littleton speaking of natural persons saith that these words (his heirs) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors).

Co. Litt. 9 b, 10 a. And here it is to be observed (that I may speak once for all) that every period of our author in all his three books contains matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heirs*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implieth, that this rule extendeth not, —

First, to *last wills and testaments*; for thereby, as he himself after saith, an estate of inheritance may pass without these words (his heirs). As if a man devise twenty acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor, albeit it be not to the value of the land. So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or *in feodo simplici*, or to him and to his assigns forever. In these cases a fee simple doth pass by the intent of the devisor. But if the devise be to a man and his assigns without saying (forever), the devisee hath but an estate for life. If a man devise land to a man *et sanguini suo*, that is a fee simple; but if it be *semini suo*, it is an estate tail.

Secondly, that it extendeth not to a *fine sur conusans de droit come ceo que il ad de son done*, by which a fee also may pass without this word (heirs) in respect of the height of that fine, and that thereby is implied that there was a precedent gift in fee.

Thirdly, nor to *certain releases*, and that three manner of ways. First, when an estate of inheritance passeth and continueth; as if there be three coparceners or joint tenants, and one of them release to the other two, or to one of them generally without this word (heirs), by Littleton's own opinion they have a fee simple, as appeareth hereafter. 2. By release, when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, &c., release to the tenant of the land generally all his right, &c., hereby the seignior, rent, &c., are extinguished forever, without these words (heirs). 3. When a bare right is released, as when the disseisee release to the disseisor all his right, he need not (saith our author in another place) speak of his heirs. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. A., seised of land, suffereth B. to recover the land against him by a common recovery, where the judgment is *quod prædictus B. recuperet versus præd. A. tenementa prædicta cum pertin.*; yet B. recovereth a fee

simple without this word (heirs); for regularly every recoverer recovereth a fee simple. 5. Nor to a *creation of nobility by writ*; for when a man is called to the Upper House of Parliament by writ, he is a baron, and hath inheritance therein without the word (heirs). . . .

But out of this rule of our author the law doth make divers exceptions (*et exceptio probat regulam*); for sometime by a feoffment a fee simple shall pass without these words (his heirs). For example, first, if the father enfeoff the son, to have and to hold to him and to his heirs, and the son enfeoffeth the father as fully as the father enfeoffed him, by this the father hath a fee simple, *quia verba relata hoc maxime operantur per referentiam ut in esse videntur*. Secondly, in respect of the consideration, a fee simple had passed at the common law, without this word (heirs), and at this day an estate of inheritance [in] tail. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (heirs); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posterity. Thirdly, if a feoffment or grant be made by deed to a mayor or commonalty, or any other corporation aggregate of many persons capable, they have a fee simple without the word (successors); because in judgment of the law they never die.¹ Fourthly, in case of a sole corporation a fee simple shall sometime pass without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him *in libera elemosina*, a fee simple doth pass without this word (successors). And so if a man give lands to the king by deed enrolled, a fee simple doth pass without these words (successors or heirs); because in judgment of law the king never dieth. Fifthly, in grants sometimes an inheritance shall pass without this word (heirs). As if partition be made between coparceners of lands in fee simple, and for owelty of partition the one grant a rent to the other generally, the grantee shall have a fee simple without this word (heirs); because the grantor hath a fee simple, in consideration whereof he granted the rent: *Ipsæ etenim leges cupiunt ut jure regantur*. Sixthly, by the forest law if an assart be granted by the king at a justice seat (which may be done without charter) to another, *habendum et tenendum sibi in perpetuum*, he hath a fee simple without this word (heirs); for there is a special law of the forest, as there is a law martial for wars, and a marine law for the seas.

And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases, or confirmations that inure by way of enlargement of estates, warranties, bargains and sales² by deed indented and enrolled, and the like, in which this word (heirs) is also necessary; for they do tantamount to a feoffment or grant, or

¹ See *Georgia v. Cincinnati So. Ry.*, 248 U. S. 26.

² But see Challis, *Real Prop.*, 3d ed., 223.

stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus*. And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example; for so our author himself in another place explaineth it, saying, "and memorandum, that in all other [such] like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law." And here our author is to be understood to speak of heirs when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavel-kind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit; but if a lease for life be made, the remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent. But where the remainder is limited to the right heirs of B., it need not be said, and to their heirs; for being plurally limited it includeth a fee simple, and yet it resteth but in one by purchase.¹

¹ See *Anderson v. Logan*, 105 N. C. 266 (1890). Cf. *Cole v. Lake Company*, 54 N. H. 242, 279-290 (1874).

As to determinable fees, see *First Universalist Society v. Boland*, 155 Mass. 171 (1892); Gray, *Perp.* (3d ed.) §§ 31-42.

In *Lewis v. Rees*, 3 K. & J. 132 (1856) land was conveyed by deed to A for life, then to B for life, then to C and D, and their heirs, in trust to preserve contingent interests, then over. It was argued that the trust was intended to continue only during the lives of A and B, that upon the deaths of A and B the trustees ceased to have any legal estate and that the persons entitled under the limitations over took legal states. The court *held*, that the trustees took a fee, that their estate could not be restricted to such estate as was necessary for the purposes of the trust, and that therefore the persons entitled under the limitations over took only equitable estates. *Cooper v. Kynock*, L. R. 7 Ch. App. 398 (1872) *accord*.

But in *Newhall v. Wheeler*, 7 Mass. 189 (1810), where land had been conveyed to A, B, and C, selectmen of a town, and their "successors," in trust for D and his heirs, the court *held*, that the trustees took a fee. "The legal estate of the trustees shall be commensurate with the equitable estate of the *cestui que trust*, which in this case is a fee simple." The court gave no authorities or reasoning in support of this conclusion. The doctrine of *Newhall v. Wheeler* has, however, been generally followed in the United States. See *Angell v. Rosenbury*, 12 Mich. 241, 266 (1864); Kales, *Estates and Future Interests*, 2d ed., §§ 183-193.

SECTION II

ESTATES TAIL

Co. Lit. 20 a, b. In gifts in tail these words (*heirs*) are as necessary, as in feoffments and grants; for seeing every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words (*heirs*), and that an estate in fee tail is but a cut or restrained fee, it followeth, that in gifts in a man's life-time no estate can be created without these words (*heirs*), unless it be in case of frankmarriage, as hereafter shall be showed. And where Littleton saith (*heirs*), yet (*heir*) in the singular number in a special case may create an estate tail, as appeareth by 39 Ass. p. 20, hereafter mentioned. And yet if a man give lands to A. *et hæredibus de corpore suo*, the remainder to B. *in forma prædicta*, this is a good estate tail to B. for that in *forma prædicta* do include the other. If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. *in forma prædicta*, this remainder is void for the uncertainty. But if the remainder had been, the remainder to C. *in eadem forma*, this had been a good estate tail; for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man, *et semini suo* or *exitibus vel prolibus de corpore suo*, to a man, and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the Statute provideth, that *voluntas donatoris secundum formam in charta doni sui manifeste expressam de cætero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himself, as it appeared in his learned reading afore-mentioned upon this Statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitime procreatis*, or *semini suo*, he hath but an estate for life, for that there wanteth words of inheritance.

These words [*of his body*] are not so strictly required but that they may be expressed by words that amount to as much: for the example that the Statute of W. 2 putteth hath not these words (*de corpore*) but these words (*hæredibus*) viz. *Cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis*. If lands be given to B. *et hæredibus quos idem B. de prima uxore sua legitime procrearet*, this is a good estate in especial tail (albeit he hath no wife at that time) without these words (*de corpore*). So it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man *et hæredibus de carne sua*, or to a man *et hæredibus de se*. In all these cases these be good estates in tail, and yet these words *de corpore* are omitted.¹

¹ See Stimson, Am. St. Law, § 1313; Kales, Estates and Future Interests, 2d ed., §§ 194-200; 402-411.

Co. LIT. 26 b. John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain lands to Roberge and to the heirs of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Mawde the daughter was tenant in tail as heir of the body of the father, *per formam doni*, and the formedon which she brought supposed, “quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred’ ipsius Johannis de præfatæ Robergiæ per præfatum Johannem procreat’ præfat’ Matildæ filiæ prædict’ Johannis de præfata Robergia per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict’.” And yet in truth the land did not descend unto her from Robert, but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land, *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*.

SECTION III

ESTATES FOR LIFE

Co. Lit. 42 a, b. If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quam diu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay x l. &c., or until the grantee be promoted to a benefice, or for any like uncertain time, which time, as Bracton saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall allege the lease, and conclude, that by force thereof he was seised generally for term of his life.

If a man make lease of a manor, that at the time of the lease made is worth xx l. *per annum*, to another until c l. be paid, in this case because the annual profits of the manor are uncertain, he hath an estate for life, if livery be made determinable upon the levying of the c l. But if a man grant a rent of xx l. *per annum* until c l. be paid, there he hath an estate for five years, for there it is certain, and depends upon no uncertainty. And yet in some cases a man shall have an uncertain interest in lands or tenements, and yet neither an estate for life, for years, or at will. As if a man by his will in writing devise his lands to his executors for payment of debts, and until his debts be paid; in this case the executors have but a chattel, and an uncertain interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattel, it shall go to the executors of executors for the payment of his debts: and so note a diversity between a devise and a conveyance at the common law in his lifetime. And tenant by statute merchant, by statute staple, and by *elegit*, have uncertain interests in lands or tenements, and yet they have but chattels, and no freehold, whose estates are created by divers Acts of Parliament, whereof more shall be said hereafter. And so have guardians in chivalry which hold over for single or double value uncertain interests, and yet but chattels.

If one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and express or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life. The same law is of a declaration of a use. A man may have an estate for term of life determinable at will; as if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for term of his life, this is determinable upon the determination of the office.

A. tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath been said an estate for a man's own life is higher than for the life of another. But if tenant in tail make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons.

First, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate tail be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.

Secondly, the law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple, but if tenant for life die, now is his wrongful estate in fee by judgment in law changed to a rightful estate for life.

ROSSE'S CASE

5 Co. 13 a. 1598.

BETWEEN Peter Rosse and Aldwick in an *Ejectione firmæ*, which began Pasch. 37 Eliz. Rot. 499, the case was such; a lease is made to A. and his assigns, *habendum* to him during his life, and the lives of B. and C.; and if this limitation during the life of B. and C. were void or not, was the question. And it was adjudged, that the limitation was good; for where it was objected that when a man hath two estates in him, the greater shall drown the less, and that an estate for his own life is higher than for the life of another; and therefore an estate for his own life, and for the lives of others, cannot stand together, — to *that* it was answered and resolved, that in the case at bar, the lessee had but one estate, which hath this limitation, *scil.* during his life, and the lives of two others, and he hath but one freehold, and therefore there cannot be any drowning of estates in the case, but he hath an estate of freehold to continue during these three lives, and the survivor of them.¹

¹ See St. 29 Car. II, c. 3, § 12 (1677); Stimson, Am. St. Law, § 1335; Warren, Cas. on Wills, p. 457.

BEESON v. BURTON

12 C. B. 647. 1852.

THE names of John Burton and twenty-eight other persons claiming under similar circumstances, appeared on the list of persons claiming to be entitled to vote in the election of any knight of the shire for the southern division of the county of Leicester, and were all duly objected to by the appellant.

The said John Burton appeared on the list of claimants, as follows:—

Name of voter.	Place of abode.	Nature of qualification.	Street, &c., where the property is situate, &c.
Burton, John.	3, Haymarket.	Freehold interest in building and land.	On road, T. Freeman's Common.

John Burton is a resident freeman of the borough of Leicester, and possessed of an allotment of land under the provisions of a private Act of Parliament, 8 and 9 Vict. c. 6, intituled "An Act to repeal so much of an Act for enclosing lands in or near the borough of Leicester, as relates to the regulation and management of the freemen's allotments, and to make other provisions in lieu thereof." By this Act, which was annexed to and formed part of the case, the resident freemen are empowered to elect from their own body a certain number of deputies to act for them in the regulation and general management of the freemen's allotments.

The 8th section empowers the deputies to take possession of the lands comprised in the first schedule of the Act (of which lands the allotment of the present claimant forms a part), and break up the whole or such parts thereof as to them shall seem expedient, and apportion and divide the same when so broken up into small allotments, not exceeding five hundred yards each, among the resident freemen desiring to become occupiers thereof, at an annual rent to be fixed at the discretion of the deputies, but not exceeding one farthing for every square yard, nor less than one shilling for every hundred yards; the allotments to be held respectively by each resident freeman desiring to become the occupier, and obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies.

By the 15th section, all the lands comprised in the two schedules of the Act, are vested absolutely in the deputies for the time being, in trust for the resident freemen.

By the 17th section, the deputies have power to dispose, by absolute sale, or all or any part of the allotment comprised in the first

schedule of the Act, freed and discharged from all right, claim, and interest of the resident freemen, but, by the 22d section, no sale is to be effected under the powers of the Act, without the consent of the major part of the freemen assembled at a public meeting, to be convened and conducted in the manner directed by this section.

By the 32d section in case any freeman shall be in arrear of rent for his allotment, for the space of fourteen days, or shall not conform to the provisions of the Act, or the orders, rules, and regulations to be made by the deputies, the said deputies may re-enter such allotment, and by force evict and dispossess such freeman.

The claimant has erected buildings on the land allotted to him, which land and buildings are above the value of 40s. above all charges.

It was contended, on the part of the appellant, that the claimant had no freehold interest in his allotment; but the revising-barrister decided that he had, and inserted his name accordingly on the list of voters for the parish of St. Mary, Leicester.

The cases of Thomas Archer, and twenty-seven other persons whose claims depended on the same point, were consolidated with the principal case.

JERVIS, C. J. It seems to me that the view taken by the revising-barrister in this case was correct, and that his decision must be affirmed,—the claimant having a freehold interest which entitled him to vote. It was admitted by the appellant's counsel, that the possession of a freehold interest of an uncertain duration, would entitle the party to a vote: but it was insisted that the estate which each allottee under this Act has, is not an estate of an uncertain duration, within the rule laid down in Co. Lit. 42 a, because it was determinable by the deputies; and therefore that the case must be governed by that of *Davis*, app. *Waddington*, resp., 7 M. & G. 37; 8 Scott N. R. 807. But, upon looking at the 8th section of the 8 & 9 Vict. c. 6, I find that each allottee is to hold his allotment "so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies." This provision is sufficient *per se* to create a freehold interest. But it is said that the whole scope of the Act, and especially the power vested in the deputies, by § 17, to sell the land, with the consent of the major part of the freemen, shows that it was not intended to give the allottees a freehold. If this is not a freehold, what estate is it? It clearly is not an estate for years: nor is it an estate at the absolute and uncontrolled will of the lessors. It is suggested that it is a sort of parliamentary estate, floating between an estate of freehold and an estate at will. It would manifestly be very inconvenient so to hold; and I do not see how we can consistently with the rules of law hold this to be any other than an estate of freehold. It is plain, according to the case of *Davis*, app., *Waddington*, resp., that, if the deputies had

the power at any moment to turn out the allottees, their estate would have been a mere estate at will, and would not have conferred a vote. But this is not an estate held at the uncontrolled will of the grantors, but at the will of strangers, or subject to the consent of the deputies and the majority of the freemen, of whom the allottee is one. The estate, therefore, is held upon an uncertain event, for, it is uncertain whether the majority will consent to a sale or exchange; and therefore the case falls within the definition of an estate for life in Co. Lit. 42 a. Consequently the claimant had a freehold interest, in respect of which he was entitled to be registered.

MAULE, J. I also am of opinion that the claimant in this case was rightly held by the revising barrister to be entitled to a freehold interest in his allotment. It is well established that an estate which may last for a man's life is, ordinarily, a freehold. An estate for life, determinable on an event which is not in the power of the lord from whom it is held, is a freehold. An estate determinable on a condition, which condition cannot arise at the absolute will of the lord, is a freehold. Here, the duration of the estate depends upon the will of the tenant, which will not prevent its being an estate of freehold: but the estate is capable of being determined upon an event of a very special kind happening, — on the resolution of the deputies to sell or exchange the land, and the concurrence of the majority of the freemen. That is an event which is not dependent on the will of the lord. There is not that arbitrary power of removal which will prevent the estate from being a freehold. It is as much out of the power of the lord to determine the estate, as if his concurrence were not necessary at all. His concurrence being necessary, does not make the concurrence of the others less independent of him. An estate which may last for the life of the grantor, though determinable under circumstances like those of this case, is clearly such an estate as according to the older authorities is an estate of freehold. The case of *Davis, app., Waddington, resp.*, appears to have been well decided. The party claiming to vote there, was appointed by the trustees to be an inmate of the almshouses, so long as they should think fit to allow him to continue there. It was held, quite conformably with the general law, that that did not constitute a freehold interest: and it is equally clear that the interest the party in this case has is a freehold.

WILLIAMS, J. I am of the same opinion. This is clearly an estate of freehold, inasmuch as it is for an uncertain interest, which may last for the life of the party, and is not confined to the will of the grantors. It comes, therefore, within the examples given in some of the older cases.

TALFOURD, J., concurred.

*Decision affirmed, with costs.*¹

¹ See *Gilmore v. Hamilton*, 83 Ind. 196; *Western Transp. Co. of Buffalo v. Lansing*, 49 N. Y. 499; *Warner v. Tanner*, 38 Ohio St. 118; Serjeant Manning's note to *Davis v. Waddington*, 7 M. & G. 37, 45-49; *Fernie v. Scott*, L. R. 7 C. P. 202.

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SECTION IV

ESTATES FOR YEARS AND AT WILL¹

LIT. § 70. Also, if a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupy it at the will of him which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

LIT. § 740. But where such lease or grant is made to a man and to his heirs for term of years, in this case the heir of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattel real, and chattels reals by the common law shall come to the executors of the grantee, or of the lessee, and not to the heir.²

Co. LIT. § 45b. Words to make a lease be, demise, grant, to farm let, betake; and whatsoever word amounteth to a grant may serve to make a lease. In the king's case this word *Committo* doth amount sometime to a grant, as when he saith *Commissimus W. de B. officium seneschalsiæ, &c., quamdiu nobis placuerit*, and by that word also he may make a lease: and therefore *a fortiori* a common person by that word may do the same.

"Of certain years." For regularly in every lease for years, the term must have a certain beginning and a certain end; and herewith agreeth Bracton, *terminus annorum certus debet esse et determinatus*. And Littleton is here to be understood, first, that the years must be certain when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an uncertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain it sufficeth, *Quia id certum est quod certum reddi potest*. For example of the first. If A., seised of lands in fee, grant to B. that when B. pays to A. xx shillings, that from thenceforth he shall have and occupy the land for 21 years, and after B. pays the xx. shillings, this is a good lease for 21 years from thenceforth. For the second, if A. leaseth his land to B. for so many years as B. hath in the manor of Dale, and B. hath then a term in the manor of Dale for 10 years, this is a

¹ For additional authorities on these subjects and on estates from year to year, see the following chapter.

² On the limitation of a term to one and the heirs of his body, see Fearn, C. R. 460-463.

good lease by A. to B. of the land of A. for 10 years. If the parson of D. make a lease of his glebe for so many years as he shall be parson there, this cannot be made certain by any means, for nothing is more uncertain than the time of death, *Terminus vitæ est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis*. But if he make a lease for three years, and so from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, first for three years, and after that for three years; and for the residue uncertain.

If a man maketh a lease to I. S. for so many years as I. N. shall name, this at the beginning is uncertain; but when I. N. hath named the years, then it is a good lease for so many years.

A man maketh a lease for 21 years if I. S. live so long; this is a good lease for years, and yet is certain in uncertainty, for the life of I. S. is uncertain. See many excellent cases concerning this matter put in the said *Case of the Bishop of Bath and Wells*. By the ancient law of England, for many respects a man could not have made a lease above 40 years at the most, for then it was said that by long leases many were prejudiced, and many times men disinherited, but that ancient law is antiquated.¹

Co. Lit. 55a. It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor;² and so are all the books that seem *prima facie* to differ, clearly reconciled. . . .

There is an express *ouster*, and implied *ouster*; an express, as when the lessor cometh upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as if the lessor without the consent of the lessee enter into the land and cut down a tree, this is a determination of the will; for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue. If a man leaseth a manor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will. The lessor may by actual entry into the ground determine his will in the absence of the lessee, but by words spoken from the ground the will is not determined until the lessee hath notice. No more than the discharge of a factor, attorney, or such like, in their absence, is sufficient in law until they have notice thereof.³

¹ See Stimson, Am. St. Law, § 1341.

² But see 1 Tiffany, Real Prop., 2d ed., § 61c.

³ 2 Bl. Com. 160, 161. "A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which

are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the Statute 13 Edw. I *De Mercatoribus*, and thence called a statute merchant; the other pursuant to the Statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the Statute 23 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which directs such recognizances to be enrolled and certified into chancery. But these by the Statute of Frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

"Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called, an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the Third Part of these Commentaries. At present I need only mention that it is the name of a writ, founded on the Statute of Westm. 2 (13 Edw. I c. 18,) by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's land and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the Statute of *Quia Emptores* (18 Edw. I.), it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the Statute, therefore, of Westm. 2, permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the Statute *De Mercatoribus* (13 Edw. I.), passed the same year, the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though one *half* of them was liable to be taken in execution for any other debt of the owner.

"I shall conclude what I had to remark of these estates by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke (1 Inst. 42, 43): 'These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds;' (which makes them an exception to the general rule) 'because though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*.' This indeed only proves them to be chattel interests,

because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts if recovered would belong. For upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors (Co. Lit. 42); because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid."

See *Jemmot v. Cooley*, 1 Lev. 170.

CHAPTER VI

LANDLORD AND TENANT¹

SECTION I

THE MAKING OF LEASES

Form of Lease in Massachusetts

This Indenture, made the *first* day of *September* in the year nineteen hundred and *twenty-one*,

WITNESSETH, that *John Doe of the City, County and State of New York*,

hereinafter called the Lessor, do hereby lease unto *Richard Roe of Cambridge, in the county of Middlesex, and Commonwealth of Massachusetts*,

hereinafter called the Lessee, *the building now numbered 13 Gloucester Street, in Boston, in the County of Suffolk and Commonwealth of Massachusetts, with the land under and around the same, as customarily used and enjoyed.*

To be used only for *a private residence.*

TO HAVE AND TO HOLD for the term of *one year* from noon of the *first* day of *September* in the year nineteen hundred and *twenty-one* unless sooner terminated, as hereinafter provided.

YIELDING AND PAYING as rent the sum of *two thousand (2000)* dollars, yearly, by equal *quarterly* payments at the usual place of business of the Lessor or his attorney of *Five hundred (500)* dollars on the first day of each *quarter* in every year during this Lease, and at that rate for any part of a *quarter* unexpired at the legal termination of this Lease, the first payment to be made on the first day of *December, 1921.*

And the Lessee accepts said premises as they now are, and hereby covenants with the Lessor that he will, during this Lease and for such further time as he or any other person or persons claiming under him shall hold the said premises, or any part thereof, pay unto the Lessor the said rent as aforesaid (except only in case of fire or other unavoidable casualty, as hereinafter mentioned), and will keep all and singular the said premises, including the plumbing and other piping, electric and other fixtures and glass (admitted now to be whole and in good order), in such repair as the same are in at the commencement of said term, or may be put in during the continuance thereof, reasonable use and wear, and damage by fire or other unavoidable casualty only excepted; and will pay all rates for the use of water, gas and electricity during the continuance of this Lease; and will not assign this Lease, nor underlet the whole or any part of the said premises, nor make or suffer any waste or any unlawful, improper, or offensive use thereof, or any occupation liable to endanger or affect any insurance on said premises, and will not make any alterations or additions during the term aforesaid without the written consent of the Lessor; and will save the Lessor harmless from any claim or damage arising from neglect to remove snow and ice from the demised premises or from the sidewalks bordering the same; and that the Lessor may, at seasonable times, enter to view the premises, or to make repairs if he should elect to do so, or to show the property and building to

¹ Only selected topics are here considered.

persons wishing to lease or buy, and three months next preceding the expiration of the term will permit the notice of "to let" or "for sale" to be placed upon the front of said premises, and remain thereon without hindrance or molestation. And that the Lessee will, at the expiration of this Lease, peacefully yield up to the Lessor the premises, and all erections and additions made to or upon the same, in good repair and condition in all respects, reasonable use and wear and damage by fire and other unavoidable casualties excepted; and that the Lessor shall not be liable to the Lessee or any other person for any injury, loss, or damage to any person or property on the premises. No waiver, express or implied, of any breach of any covenant shall ever be held or construed as a waiver of any other breach of the same covenant.

If the premises, or any part thereof, shall, during this Lease, be destroyed or damaged by fire or other unavoidable casualty, then this Lease and the term demised shall terminate at the election of the Lessor, or if he shall not so elect, then in case of any such injury to the premises demised, a just proportion of the rent hereinbefore reserved, according to the nature and extent of the injury sustained by the demised premises, shall be suspended or abated until the demised premises, or what may remain thereof, shall have been put, by the Lessor, in proper condition for use and habitation.

These presents are upon condition that in case of any breach of any covenant to be observed by the Lessee, or in case the estate hereby created shall be taken from the Lessee by process of law or otherwise, the Lessor may, immediately or at any time thereafter, and without notice or demand, enter upon the premises, and repossess the same as of his former estate, and upon such entry this Lease shall be determined, but without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenant.

The covenants herein shall run with land.

It is agreed and understood that, as this form of Lease may be used by Lessors and Lessees of either sex and for corporations, and also where there are several Lessors or several Lessees, in such cases the masculine and singular, as herein used, shall be instead of and shall stand for the feminine or neuter gender or the plural number, as the context may require.

IN WITNESS WHEREOF, the said parties have hereunto and to an original duplicate hereof set their hands and common seal the day and year first above written.

JOHN DOE

(Seal)

RICHARD ROE

RIGHT d. FLOWER v. DARBY AND BRISTOW

1 T. R. 159. 1786.

EJECTMENT tried at the last assizes at Salisbury, before *Hotham*, Baron, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on the following case:—

That the lessor of the plaintiff was seised in fee of the premises in question. That on the 11th day of May, 1781, the defendant, Darby, took the premises, which are a house in Salisbury, and occupied them as a public-house from that time under a parol demise at £10 *per annum*; the rent to commence from Midsummer then next following. The defendant, Darby, let part of the premises to the defendant

Bristow. That on the 26th March, 1785, the defendant Darby was served with a notice to quit on the 29th of September following.

The question is, Whether the lessor of the plaintiff is entitled to recover?

LORD MANSFIELD, C. J. When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term.

If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year; now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement.

As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there to be sure much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature of the first contract.

ASHURST, J. There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases, where the same hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London, being let to a tenant at Lady-day to hold as in the present case: if the landlord should give notice to quit at Michaelmas, he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings.

BULLER, J. It is taken for granted by the counsel for the plaintiff, that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case; an annual rent is here reserved; and upon such a holding it has been determined that *half a year's notice* to quit is necessary. This doctrine was laid down as early as in the reign of Henry the Eighth (13 H. VII. 15b).¹ The moment the year began, the defend-

¹ The following remark of Serjeant Willoughby is the passage referred to: "If the lessor does not give him notice before the half year, he can justify for the next year, and so from year to year."

ant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the Year-Books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also.

*Judgment for the defendant.*²

DOUGAL v. MCCARTHY

[1893] 1 Q. B. 736. 1893.

APPEAL from the judgment of *Hawkins, J.*, at the trial without a jury.

The action was for two quarters' rent of premises alleged to be in arrear.

The facts were, so far as material, as follows:—

By an agreement made in February, 1891, between the plaintiff (thereinafter referred to as "the landlord") of the one part, and certain persons, directors of the National Press Association, Limited, of whom the defendant was one (thereinafter referred to as "the tenants") of the other part, the landlord agreed to let, and the tenants for themselves and their assigns, and as a separate and personal agreement each of them for himself and his assigns, agreed to take, certain rooms at No. 62, Strand, for one year commencing on February 1, 1891, at the rent of 140*l.*, payable by four equal quarterly payments in advance on February 14, May 14, August 14, and November 14. The tenants entered and occupied the premises under such agreement. After the expiration of the year ending February 1, 1892, they remained in possession of the premises.

On February 25, the plaintiff wrote to the secretary of the National Press Association, asking for a cheque for 35*l.* for a quarter's rent

² See *Judd v. Fairs*, 53 Mich. 518; *Williams v. Deriar*, 31 Mo. 13; *Roberts v. District Court*, 43 Nev. 332; *Montalvo v. Levinston*, 94 N. J. L. 87; *Douglass v. Seiferd*, 18 Misc. (N. Y.) 188; *Patton v. Axley*, 5 Jones Law, (N. C.) 440; *Lesley v. Randolph*, 4 Rawle (Pa.) 123; *Hall v. Wadsworth*, 28 Vt. 410; *Elliott v. Birrell*, 102 S. E. (W. Va.) 762. Compare *Carlisle v. Weiscopf*, 237 Mass. 183.

In *Miles v. Goff*, 14 M. & W. 72, a tenancy from year to year had commenced on the 11th of October. On the 17th of June, 1840, the tenant was given a notice to quit "on the 11th of October now next ensuing, or such other day and time as his said tenancy might expire on." Held, this was not a good notice for the year ending on the 11th of October, 1841. See *Doe d. Bedford v. Kightley*, 7 T. R. 63; *Doe d. Williams v. Smith*, 5 A. & E. 350. Compare *In re Threlfall*, 16 Ch. D. 274, 281; *Gray v. Spyer*, [1921] 2 Ch. 549.

An express oral lease from year to year is not void under the Statute of Frauds. *Legg v. Strudwick*, 2 Salk. 414. And see *Swan v. Clark*, 80 Ind. 57; *Brown v. Kayser*, 60 Wis. 1; *Birch v. Wright*, 1 T. R. 378.

due on the 1st instant. No answer was sent to that letter, and the tenants remained in possession. On March 26 the secretary wrote to the plaintiff: "I am instructed by Messrs. McCarthy and" (mentioning the names of the other tenants) "to inform you that it is their intention to discontinue their present tenancy of the offices at 62, Strand, London, at present occupied by them for the purposes of this company, and I am directed to give you notice that they will not continue same beyond the period required under their agreement. I shall of course be glad if you can see your way to take up the premises on May 14, or even earlier. We shall of course give you every facility for the securing of a new tenant, and I am sure you will meet us in the same spirit." In answer to this letter the plaintiff's solicitors wrote on March 31 as follows: "Mr. Dougal has handed us your letter, giving notice to give up No. 62, Strand, London, which notice will expire on February 1, 1893. Our client will be ready to meet you, if you have an assignee of the premises, or will be happy to consider a surrender of the present term, if other suitable terms are submitted. We are instructed to ask you to be good enough to pay us the quarter's rent due February 1, and shall be obliged by a remittance at your early convenience."

No answer was sent to this letter. On May 23 the action was commenced. The learned judge was of opinion that the facts did not shew that there had been an agreement for a tenancy from year to year after February 1, 1892. He therefore gave judgment for the defendant.¹

LORD ESHER, M. R.² I cannot agree with the decision of the learned judge. There seems to be no dispute as to the facts of this case. The defendant and others became tenants to the plaintiff of certain premises for a year ending February 1, 1892, under an agreement, which contained certain terms, amongst others, as to the amount and the time of payment of rent. The year came to an end, and the tenancy under the agreement accordingly expired by effluxion of time. The tenants, however, remained in possession of the premises. The evidence appears to me clearly to shew that the landlord consented to their so remaining in possession as tenants; and that he treated them as tenants from year to year on the terms of the previous tenancy, i. e., at the same rent payable at the same periods as before; for on February 25, he wrote to them demanding a quarter's rent on that footing. After that letter they still remained in possession, and on March 26 they wrote him a letter, the effect of which I will deal with presently. I take it that the doctrine laid down by Lord Mansfield in *Right v. Darby*, 1 T. R. 159, is correct. He there

¹ It will be observed that there was no claim as for use and occupation. The defendant was willing to pay as for use and occupation up to May 14; but the plaintiff's contention was that a tenancy from year to year had been created on the terms of the old lease, and he claimed for rent accordingly.

² The concurring opinions of *Lopes* and *A. L. Smith*, L. JJ., are omitted.

said: "If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year." Here there is the landlord's consent, and the fact that the tenants remained in possession after the letter written by him. I take it that it would be a question for a jury in such a case, whether there was the consent of both parties that the tenant should remain in possession after the termination of the expired tenancy. If the tenant under such circumstances remained in possession without saying anything, I should say that a jury ought to conclude that he consented to continue in possession as tenant. If the tenant remained in possession, but made some statement inconsistent with his remaining as tenant—for instance, if he said that the property belonged to him, or if he defied the landlord to do his worst, and said that he would not go out till he was turned out—in that case I should think the jury would say that he did not consent to remain in as tenant, and was a mere trespasser. I do not think that it is necessary, for the purposes of this case, to determine the question whether, if the tenant, though consenting to remain as tenant, nevertheless made some stipulation inconsistent with the notion that he was remaining in possession as tenant from year to year on the terms of the old lease, that inconsistency would justify the jury in saying that that which would otherwise be the implication of law was done away with. But, if after the expiration of a lease the jury find that by consent of both parties the tenant remained in possession as tenant, and nothing was said inconsistent therewith, the implication of law mentioned by Lord Mansfield arises, viz., that there is a tenancy from year to year on the terms of the old lease so far as they are consistent with such a tenancy. Buller, J. in *Right v. Darby*, 1 T. R. 159, in effect laid down the law in the same way as Lord Mansfield. He said: "It is taken for granted by the counsel for the plaintiff that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is that the agreement is a letting for a year at an annual rent; then, if the parties consent to go on after that time, it is a letting from year to year."

Therefore, if there is the consent of both parties that the tenant shall remain in possession as tenant, and nothing is said to rebut that inference of law, it is by law a tenancy from year to year on the terms of the old tenancy, so far as applicable. Here there was evidence to shew that the landlord consented to the tenants remaining in possession, and that the tenants also consented to remain in possession, as tenants. I should have said that the mere fact of their holding over as they did was evidence on which a jury ought to infer that they agreed to remain in possession as tenants, for I do not think the jury

ought to infer that they intended to remain in possession as trespassers. But in this case the evidence goes further. In the letter of March 26, the tenants' secretary says that it is their intention "to discontinue their present tenancy." The original tenancy was over, so that this language could only refer to a fresh tenancy. Then he says that he is instructed to give notice that they will not continue the same beyond the period required under their agreement, and proceeds: "I shall of course be glad if you can see your way to take up the premises on May 14, or even earlier." What do the expressions so used mean? They seem to me to admit that, if they have assented to a tenancy, such tenancy is in law a tenancy from year to year, and to give notice to determine such tenancy at such period as it may be determinable by law, but to request the landlord, if he can see his way to it, to take the premises off their hands sooner. Such language is quite inconsistent with the notion that they had a right to put an end to the tenancy when they pleased, and therefore that it was a tenancy at will. Therefore, so far from this letter being inconsistent with the implication of law that they had consented to remain in possession as tenants from year to year, it seems to me clearly to admit that such was the case.

I think that the proper inference from the facts is that they consented to remain tenants, and did not attempt to impose any term inconsistent with the tenancy which the law would imply from such consent, viz., a tenancy from year to year on the terms of the old tenancy so far as consistent with a tenancy from year to year. I think the term for payment of rent in advance was not inconsistent with such a tenancy, and therefore I think that the plaintiff was entitled to recover the rent which he claimed. For these reasons I think that this appeal should be allowed.¹

PROVIDENCE COUNTY SAVINGS BANK v. HALL.

16 R. I. 154. 1888.

DEFENDANT'S petition for a new trial.

February 18, 1888. DUFFEE, C. J. This is a petition for a new trial of an action of *assumpsit* for the use and occupation of a small farm with dwelling-house thereon for one year. The action was tried in the Court of Common Pleas. It appeared on the trial that the defendant entered into occupation in 1877, hiring for a year from April 1, 1877, to April 1, 1878, at \$300 per annum, and continued to occupy at the same rent until the year 1883-84; that on October 1, 1883, he received written notice from the plaintiff bank to quit April

¹ See *Roe d. Jordan v. Ward*, 1 H. Bl. 97. Compare *Ibbs v. Richardson*, 9 A. & E. 849.

1, 1884, but continued, notwithstanding, to occupy until the latter part of November, 1884, when, without written notice to the bank he quitted, leaving the key with a neighbor, from whom he got it when he first entered as tenant. He testified that about April 1, 1884, he saw the treasurer of the bank, who had charge of the letting, and asked permission to remain a few months until a house then building for him could be completed, and that the treasurer refused to give it, saying that it would be an injury to the bank, which wanted to sell, and that in August the bank had a board set up on the premises with "For Sale" painted thereon. He also testified that the farm contained only about thirteen acres, mostly poor land; that he did not plough or plant in 1884, because he expected to leave, and only mowed the lawn in front of the house, getting not over a quarter of a ton of hay. This testimony was not contradicted. He had, however, been accustomed to pay the taxes, and to have the amount deducted from the bill for rent. He paid the tax of 1884.

The bank claimed on this testimony that it was entitled to recover \$300 rent for the year ending April 1, 1885. The defendant contended that under the notice to quit, his yearly tenancy ended April 1, 1884, and that he was not liable for a year's rent for the year ensuing. He asked the court to charge the jury that if they should find that the bank gave the proper notice to terminate the letting April 1, 1884, the letting did then terminate, and the bank, if it did not afterwards recognize him as tenant by taking rent or otherwise, was absolved from giving him further notice, and he was absolved from giving notice to the bank in order to quit legally; and also to charge that if the letting came to an end April 1, 1884, and the bank refused to let further, there could be no yearly letting or tenancy afterwards until a new contract was entered into either by implication or otherwise. The court refused so to charge, but did charge in effect that if the bank delayed to act on the notice to quit for an unwarrantable time, it lost the benefit of it, and could only terminate the letting at the end of the going year by another notice, and the defendant could only terminate his tenancy in like manner, and left the jury to determine as a matter of fact whether the bank did unreasonably delay. The jury returned a verdict for the bank for a year's rent. The question is, whether the rulings and refusals to rule were erroneous.

The purport of the charge was that, if a tenant from year to year holds over after his tenancy has been terminated by notice to quit, it is optional with the landlord either to follow up the notice by ejectment, or to waive the notice and hold the tenant for another year, whether the tenant actually agrees to it or not. The charge is supported by numerous American cases. *Hemphill v. Flynn*, 2 Pa. St. 144; *Bacon v. Brown*, 9 Conn. 334; *Conway v. Starkweather*, 1 Denio, 113; *Schuyler v. Smith*, 51 N. Y. 309; 10 Amer. Rep. 609;

Witt v. The Mayor, &c. of New York, 5 Robertson N. Y. 248; also 6 Robertson N. Y. 441; *Noel v. McCrory*, 7 Cold. Tenn. 623; *Schuisler v. Ames*, 16 Ala. 73; *Wolffe v. Wolff & Bro.*, 69 Ala. 549; *Clinton Wire Cloth Co. v. Gardner et al.* 99 Ill. 151; *Tolle v. Orth*, 75 Mich. 298. Some of these cases are very strong. Thus, in *Conway v. Starkweather*, the tenant held over fourteen days, having refused to renew the tenancy before his term expired; in *Schuyler v. Smith*, tenants of a wharf held over twenty-one days, while another wharf was preparing for them, they having given notice before their lease ended that they should not continue the tenancy; in *Wolffe v. Wolff & Bro.* the tenant held ten days after his term expired, under notice previously given that he could not quit at once, but would pay a reasonable rent for the unavoidable occupancy; and in *Clinton Wire Cloth Co. v. Gardner et al.*, the tenants held over eleven days under notice that they should not remain without a reduction of rent; their holding over being in part the result of expectation that the rent would be reduced. It is true that in the cases cited the tenant was in for a definite term; but so long as the letting is terminated, we do not see that it matters whether it be terminated by effluxion of time or notice to quit. In *Schuyler v. Smith* the tenant contended that the relation of landlord and tenant could only be created by agreement, and there could be no agreement without mutuality. The court replied that the tenant held over at his peril, the landlord having the option to treat him as trespasser or tenant for a year longer on the terms of the prior lease so far as applicable, the tenancy arising by operation of law regardless of the tenant's assent. In *Clinton Wire Cloth Co. v. Gardner et al.* the court said that the rule laid down in *Schuyler v. Smith* "is the one established by the current of American decisions." The ground of decision is that when a tenant holds over he presumably holds over for another year, if the prior tenancy was for one or more years; or, if the time was shorter, for another term in case the landlord assents; and he cannot be permitted to overthrow this presumption by setting up that he intended to hold over as a wrong-doer and not as a tenant; and the doctrine is urgently defended on the ground that the tenant being in possession has the landlord at disadvantage, and can greatly embarrass or defeat his arrangements for a new letting by holding over, and therefore should not do so without the risk of being held himself.

The English cases are more lenient to the tenant, and hold that by holding over he becomes simply a tenant at sufferance, and cannot be held for another year or term without his assent, express or implied, the question of assent being a question of fact for the jury. *Ibbs v. Richardson*, 9 A. & E. 849; *Jones v. Shears*, 4 A. & E. 832; *Waring v. King*, 8 M. & W. 571. The English rule is recognized in Massachusetts and Missouri. *Delano v. Montague*, 4 Cush. 42; *Edwards et al. v. Hale et al.*, 9 Allen, 462; *Emmons v. Scudder*, 115

Mass. 367; *Neumeister v. Palmer*, 8 Mo. App. 491. In *Edwards et al. v. Hale et al.* the court held that for the creation of a new tenancy "there must be a new contract, either express or inferable from the dealings of the parties," and remarked that *Conway v. Starkweather* was not well sustained by authority. The remark could not now be repeated very well.

There is no reported decision in this State which is in point. We think it has been generally supposed that where a tenant holds over he is presumed to become a tenant for another year, or, if the prior term was shorter, for another term, if the landlord consents. On the question whether the presumption is rebuttable otherwise than by proving a new contract, we are not aware that there is any prevalent opinion.

We decide, in accordance with what we consider to be the greater weight of American authority, that, if a tenant holds over without any new contract, it is optional with the landlord to treat him either as a trespasser or as tenant from year to year, in case the prior term was for a year or longer; and if the prior term was shorter than a year, then from term to term, according to such shorter term; an election to treat him as tenant, however, being inferable from any unreasonable delay to proceed against him as a trespasser, as well as from words or acts directly recognizing him as tenant. *Conway v. Starkweather*, *supra*; *Moshier v. Reding et al.*, 12 Me. 478; *Douglas v. Whitaker*, 32 Kans. 381.

Of course if a tenant remains in possession for some particular time or purpose, by permission of the landlord, he will only be liable, unless he exceeds the permission for the period of occupation. And so, if the landlord accepts a surrender of the premises from the tenant holding over, the tenant will be liable for rent, or use and occupation, only up to the time of such acceptance.

*Petition dismissed.*¹

¹ *Black v. La Porte*, 271 F. R. 620; *Mason v. Wierengo*, 113 Mich. 151; *Haynes v. Aldrich*, 133 N. Y. 287; *Hobbs v. Grand Trunk Ry. Co.*, 93 Vt. 392, *accord.* Compare *Waring v. Louisville & N. R. Co.*, 19 F. R. 863; *Kyle v. Gadsden Co.*, 200 Ala. 593; *Skaggs v. Elkus*, 45 Cal. 154; *Dietrich v. O'Brien*, 122 Md. 482; *Faraci v. Fasulo*, 180 N. W. (Mich.) 497; *Rice v. Atkinson Co.*, 183 N. W. (Mich.) 762; *Hunter v. Frost*, 47 Minn. 1 (Statute); *Pusey v. Presbyterian Hospital*, 70 Neb. 353; *Herter v. Mullen*, 159 N. Y. 28; *Rourke v. Fraser*, 110 Atl. (R. I.) 377; *Greene v. Walsh*, 112 Atl. (R. I.) 801; *Mayo v. Claflin*, 93 Vt. 76. See *Mikesell v. Wade*, 181 N. W. (Mich.) 970; *Richardson v. Neblett*, 122 Miss. 723; *Ancona Printing Co. v. Welsbach Co.*, 92 N. J. L. 204; *Murrill v. Palmer*, 164 N. C. 50; *Mitchell v. Hyman*, 111 Atl. (R. I.) 369. Authorities are collected in 2 Tiffany, Landl. and Ten. §§ 209, 210; 25 L. R. A. n. s. 855 note; 40 L. R. A. n. s. 498 note.

DOE d. THOMSON v. AMEY.

12 A. & E. 476. 1840.

EJECTMENT, on the several demises of Elizabeth Thomson and others, to recover possession of a farm occupied by the defendant.

On the trial, at the Cambridge Spring Assizes, 1839, before *Tindal*, C. J., it appeared that on 29th July, 1835, articles of agreement had been entered into between Miss Thomson, the lessor of the plaintiff, and the defendant, whereby Miss Thomson, for and on behalf of herself and others, devisees in trust under the will of her father, in consideration of the rent and covenants thereafter mentioned to be paid and performed by the defendant, agreed with the defendant, so far as she lawfully could or might, that she and all other necessary parties should and would grant a lease of the farm to defendant, excepting out of the said lease agreed to be made all trees, mines, &c., with liberty of ingress and egress for the intended lessors, for fourteen years, from 11th October then next, at a rent of £346, payable quarterly. And it was thereby agreed, that there should be contained in the lease covenants to repair, the said "intended lessors" finding rough timber; that defendant should not assign without license; that defendant should use the premises agreed to be demised in a husbandlike and proper manner according to the best system of husbandry practised in that part of the country; that defendant should, during the said term, scour ditches and drains, and make and renew hedges; that defendant would not destroy any trees, nor grow two successive crops of white corn or grain on any of the arable land without summer tilting, or taking a green fallow crop; nor sell or suffer to be taken off the premises any of the hay or straw grown, or manure made thereon, but should spend them on the premises. And it was further agreed that the lease should contain a proviso empowering the intended lessors to enter on the premises as of their former estate in case defendant should fail in observing any of the covenants or agreements therein contained; and all other usual and proper covenants in leases of a like nature. It was also agreed that defendant should execute a counterpart of the lease, and defray the expense of the articles of agreement.

The defendant entered into possession at the time fixed for the commencement of the term, and continued to hold and pay the rent until action brought; but no further lease was ever made or executed.

Before the commencement of the action, notice of several breaches of agreement was served on the defendant by the lessor of the plaintiff. One of these, namely, that defendant had taken successive crops of white corn on the same land without summer tilting or green fallow, was satisfactorily proved on the trial, and the plaintiff had a verdict, subject to a motion for a nonsuit on the grounds hereafter stated.

In the following term, *B. Andrews* obtained a rule *nisi* in pursuance of the leave reserved.

LORD DENMAN, C. J. In this case the defendant was let into possession under an agreement, which gave the parties a right to go into equity to compel the execution of it by making out a formal lease. Under such circumstances it has long been the uniform opinion of Westminster Hall, that the tenant in possession holds upon the terms of the intended lease. One of these terms was, that the lessee should not take successive crops of corn, and that the lessor should have power to re-enter on the breach of such agreement. This agreement and proviso apply to the yearly tenancy of the defendant. It has been argued, that the terms of the lease cannot be applied to the parol tenancy, inasmuch as some of them, such as the agreement for repairs, are not usually considered as applicable to such tenancy. Whether the obligation to repair can be enforced under such circumstances, at least as to substantial repairs, may perhaps be questionable;¹ but at all events, the agreement as to cropping the land is one which is consistent with a yearly tenancy.

PATTESON, J. In *Mann v. Lovejoy*, Ry. & M. N. P. C. 355, though the facts differed from those of the present case, yet, in principle, the ruling of Abbott, C. J., is in favor of the plaintiff. It is said, that a covenant respecting the rotation of crops cannot be engrafted on a yearly tenancy; but I see no reason why it should not. The tenant in possession under such circumstances is bound to cultivate the land, as if he were going to continue in possession as long as the lease itself would have lasted. It is argued, that the tenancy arises by operation of law upon the payment of rent, and that the law implies no particular mode of cropping, nor any condition of re-entry. But the terms upon which the tenant holds are in truth a conclusion of law from the facts of the case, and the terms of the articles of agreement; and I see no reason why a condition of re-entry should not be as applicable to this tenancy as the other terms expressed in the articles.

WILLIAMS, J. It is admitted, that, if this were a case of holding over, the terms of the written agreement would apply. In principle, there is no distinction between that case and the case of a tenant who enters and pays rent upon the faith of an executory agreement for a lease.

*Rule discharged.*²

¹ But see *Richardson v. Gifford*, 1 A. & E. 52.

² See *Hyatt v. Griffiths*, 17 Q. B. 505; *Martin v. Smith*, L. R. 9 Exch. 50; *Bradbury v. Grimble & Co.*, 124 L. T. Rep. 189; and note to *Doe v. Stratton*, post p. 211. Compare *Wedd v. Porter*, [1916] 2 K. B. 91.

The effect of the equitable doctrine of specific performance was considered in *Walsh v. Lonsdale*, 21 Ch. D. 9, and in *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. And see *Morrison v. Herrick*, 130 Ill. 631.

BRAYTHWAYTE v. HITCHCOCK

10 M. & W. 494. 1842.

DEBT for rent. The first count of the declaration stated a demise, on the 26th of October, 1840, from the plaintiff to William Hitchcock, of a messuage and premises, to hold for one year from the 25th of December then last, and so on from year to year if the plaintiff and the said William Hitchcock should respectively please, at the annual rent of £140, payable quarterly on &c.: that, during the said tenancy, to wit, on the 17th July, 1841, all the estate and interest of the said W. Hitchcock in the said messuage and premises came to and vested in the defendant, by assignment from the said W. Hitchcock: and alleged as a breach the nonpayment by the defendant of £35, a quarter's rent due at Christmas, 1841. There was also a count on an account stated.

The defendant pleaded, first, *nunquam indebitatus*; secondly (to the first count), a denial of the demise to W. Hitchcock; and thirdly (to the first count), a denial that the estate and interest of W. Hitchcock vested in him the defendant: on which issues were joined.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after last term, the plaintiff put in evidence an agreement, dated the 17th December, 1840, and signed by the plaintiff only, whereby the plaintiff agreed to execute a lease of a cottage, &c. to W. Hitchcock, for seven years, at a yearly rent of £140, payable quarterly. It was proved that no lease had been executed in pursuance of the agreement, but that W. Hitchcock had entered into possession of the cottage shortly after the date of the agreement, and had paid two quarters' rent up to Midsummer, 1841, at the rate of £140 a year. The plaintiff then proved a notice to the defendant to produce a deed of assignment, bearing date the 17th July, 1841, of the cottage, from W. Hitchcock to the defendant: and on its nonproduction, called a witness, who produced a paper which he said was a true copy of the original assignment, which he had read and compared with it. It was objected that this copy could not be read in evidence for want of a stamp; but the Lord Chief Baron overruled the objection, and the copy was read: from which it appeared, that by the deed of assignment, which was executed both by W. Hitchcock and the defendant, after reciting the agreement of the 17th December, 1840, and that no lease had been executed in pursuance thereof, W. Hitchcock assigned to the defendant, his executors, &c., all the said agreement, and all benefit and advantage thereof, and all his estate, title, and interest therein, to hold to the defendant, his executors, &c., absolutely, subject nevertheless to a proviso for redemption. It was contended for the defendant, that there was no sufficient evidence of a demise whereby a tenancy from year to year was created, as alleged in the declaration. The Lord Chief Baron overruled the objection, and the

plaintiff had a verdict for £35, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no sufficient evidence of the assignment.

LORD ABINGER, C. B. I think the evidence was sufficient to shew a tenancy from year to year, under the agreement, which was duly executed by the plaintiff; the cases which have been decided on this point go fully that length. Here there is the additional fact of an admission under the defendant's hand, in the deed of assignment, that an agreement for the lease was executed by the plaintiff. But the plaintiff's case does not rest solely on the agreement to let; there is the fact of William Hitchcock having been in the possession of the cottage for more than a year, and having paid two quarters' rent under the agreement. William Hitchcock had therefore an assignable interest, which passed to the defendant under the deed proved at the trial. As to the other point, I think the provisions of the Stamp Acts relate only to such copies as are evidence *per se*, and that the word "copy" there means an *authenticated* copy, receivable as evidence in the first instance. Here the copy was evidence, only because the party who produced it had compared it with the original, and swore to the contents of it, word for word.

PARKE, B. I am of the same opinion. Although the law is clearly settled, that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in *Richardson v. Langridge*, 4 Taunt. 128, a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only. In the present case, there was distinct proof of the payment of rent for two quarters of a year. There is the additional fact of an occupation for more than a year; but in the case of *Cox v. Bent*, 5 Bing. 185; 2 M. & P. 281, where a party, under an agreement for a lease, had occupied for more than a year, the Court held that a tenancy from year to year existed, not on the ground of the occupation, but because the party had during that occupation paid a half-year's rent. I think, therefore, the fact of such a payment was the stronger evidence in this case, and that William Hitchcock may be taken to have been a yearly tenant. Then, as to the question whether there has been a due assignment of such his interest, I think it is clear that there has; because, although the deed in its commencement recites only the agreement, the operative part of it conveys and assigns "all that the hereinbefore recited agreement of the 17th of December, 1840, and all benefit and advantage thereof, and all that and those the said messuage or tenement and premises at &c., and all the right, title, interest, property, claim, and demand whatsoever, at law or in

equity, of him the said William Hitchcock in the said premises," &c. On the other point, I quite agree with my Lord Chief Baron that no stamp was requisite, inasmuch as, though the document might in form have been read as a copy of the original, it was in truth read only as a memorandum to refresh the memory of the witness, who had compared it with the deed.

GURNEY, B., concurred.

ROLFE, B. If we look to the context of the schedule to the Stamp Act, it is evident that the word "copy" is not used in the ordinary sense; for a high rate of duty is first imposed on copies authenticated or attested for the security or use of any person being a party thereto, or taking any benefit or interest immediately under it; and afterwards a lower rate of interest is imposed, where the copy is made for the use of any other person not being a party thereto, or taking such interest or benefit.

*Rule refused.*¹

DOE d. TILT v. STRATTON

4 Bing. 446. 1828.

THE lessor of the plaintiff had entered into an agreement to grant the defendant a lease of the premises described in the declaration, for seven years, to commence on the 29th of September, 1820. The lease was never executed, but the defendant occupied the premises, and paid the rent which was to have been reserved by the lease. On the 29th September, 1827, the defendant, having received no notice to quit, refused to deliver up the premises to the lessor of the plaintiff, whereupon the present action was commenced.

At the trial before *Best*, C. J., Middlesex Sitings after Michaelmas Term last, a verdict was taken for the lessor of the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the court should be of opinion that he was entitled to notice to quit.

BEST, C. J. We should multiply notices to quit unnecessarily if we held that this action did not lie. Within the seven years the defendant could not have been turned out without notice; but at the end of the seven years the contract itself gives him sufficient notice. The point is, in effect, decided in *Doe d. Bloomfield v. Smith*, 6 East 520, and *Doe d. Oldershaw v. Breach*, 6 Esp. N. P. C. 106.

PARK, J., concurred.

BURROUGH, J. During the seven years notice would have been necessary, but not at the end of that period.

¹ And see *Huntington v. Parkhurst*, 87 Mich. 38; *Leavitt v. Leavitt*, 47 N. H. 329. Compare *Hunt v. Morton*, 18 Ill. 75; *Hall v. Hall*, 6 Gill. & J. (Md.) 386; *Schneider v. Lord*, 62 Mich. 141; *Brant v. Vincent*, 100 Mich. 426; *Rigely v. Stillwell* 25 Mo. 570; *Den d. Snowhill v. Snowhill*, 23 N. J. L. 447; *Jackson d. Livingstone v. Bryan*, 1 Johns. (N. Y.) 322.

GASELEE, J. Notice was not necessary in this case, nor does the agreement give one party any advantage over the other.

*Rule refused.*¹

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RICHARDSON v. LANGRIDGE

4 Taunt. 128. 1811.

TRESPASS for breaking and entering a stable of the plaintiff, and breaking to pieces the doors and locks, and tearing down, damaging, and destroying the bins, troughs, and mangers of the plaintiff, and locking up the stable, and expelling the defendant from his possession. The defendant pleaded, first, Not guilty; secondly, that R. Crossley, being seised in fee of the premises, by indenture demised to the defendant, among other things, the stable, for a term of twenty-one years yet unexpired, by virtue whereof the defendant entered and was possessed, and by reason of such possession justified the acts complained of in the declaration. The plaintiff, confessing the seisin of Crossley, and the lease to the defendant, replied, that the defendant afterwards, and during the said term of twenty-one years, demised to the plaintiff the said stable with the appurtenances, to hold to the plaintiff during a certain term, that is to say, for so long a time as they, the plaintiff and the defendant, should respectively please, the plaintiff rendering to the defendant a certain compensation between them in that behalf agreed upon for the same, by virtue of which demise the plaintiff entered and was possessed, until the defendant afterwards and *during the continuance of the said term, and interest of the plaintiff* therein of his own wrong committed the said several trespasses. The defendant apprehending that the demise laid in the plea was descriptive of a holding from year to year, instead of rejoining that he had determined his will, rejoined, that he *did not demise* the said stable to the plaintiff in manner and form as the plaintiff had alleged, and tendered issue thereon, in which the plaintiff joined. Upon the trial of this cause, at the Maidstone Summer Assizes, 1811, before *Lord Ellenborough*, C. J., the evidence was, that the defendant having taken a lease of a close of land, and built a shed therein, in August, 1810, let the same by parol to the plaintiff, who was a carrier, upon an agreement made without any reference to time, that the plaintiff should convert it into a stable, and that the defendant should have all the dung made by the plaintiff's horses. The plaintiff, after having for some time occupied it in its original state, laid out about six pounds in putting up a rack and manger, and converting the building to a stable; about the end of the following April the defendant requested him to leave the prem-

¹ See *Coudert v. Cohn*, 118 N. Y. 309; *Doe d. Rigge v. Bell*, 5 T. R. 471; *Doe d. Robinson v. Dobell*, 1 Q. B. 806; *Berrey v. Lindley*, 3 M. & G. 498; *Croft v. Blay*, [1919] 1 Ch. 277.

ises, and upon his refusing to do it till he could suit himself elsewhere, the defendant, in the plaintiff's absence, and without having given him any written notice to quit, forced open the door, took down the rack and manger, and carried it out of the stable and took and used the manure which had been made upon the premises during the plaintiff's occupation of them, and which was of considerable value. The defendant's counsel contended, that the evidence proved a strict tenancy at will (which, though it made good the defendant's case, the plaintiff by his replication himself alleged, and the defendant by his rejoinder denied), and that therefore the defendant was entitled at any time to determine his will, and to enter upon the premises and resume the possession when he pleased, without any notice to quit. The counsel for the plaintiff contended that this must be a yearly holding, or that at all events the defendant having put the plaintiff into possession, and suffered him to contract an expense, by erecting a rack and manger, could not countermand the permission at his pleasure, upon the same principle on which, in the case of *Winter v. Brockwell*, 8 East, 308 it was held, that a license once executed, if it be to a thing whereby the party incurs expense, cannot be revoked, unless the grantor tenders to the grantee all the expense which he has incurred in executing the license. Lord Ellenborough, C. J., thought that the demise being so long as each party should respectively please, warranted the defendant in putting an end to the holding when he pleased, and in evicting the tenant without any notice; whereupon the plaintiff, either not adverting to the terms of his issue, or probably fearing that though he had literally proved his issue, and was entitled to a verdict thereon, the defendant would be entitled to judgment *non obstante veredicto*, submitted to a nonsuit.

MANSFIELD, C. J. *Winter v. Brockwell* has not the slightest resemblance to the present case. You must find some Act of Parliament; or some decision of the courts, that two persons cannot agree to make a tenancy at will. But it is a maxim, that *modus et conventio vincunt legem*. Have you any case where the courts have declared that there must be a tenancy from year to year, the parties having expressly agreed that the holding shall be so long as both parties please? and of that there is evidence here: you say that Lord Ellenborough was of opinion that the evidence did not prove a tenancy for a year: the nonsuit then must have proceeded on the ground that there was such an agreement as the plaintiff has himself stated. Here you speak, all along, of an indefinite agreement. If there were a general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement.

HEATH, J. I am of the same opinion. It is said that an indefinite hiring of a servant is an hiring for a year, but those cases do not apply. That presumption is founded upon the universal custom of hiring servants at statute fairs, which is usually for a year. There is no custom that if a man lets premises to another he shall let them for a year.

CHAMBRE, J., denied the proposition, that at this day there is no such thing as a tenancy at will: the taking of the dung by the landlord gave the tenant no term in the premises. Surely the distinction has been a thousand times taken: a mere general letting is a letting at will: if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the courts have said, that is evidence of a taking for a year. That is the old law, and I know not how it has ever come to be changed. The courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none such.

The court refused the rule.¹

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BARLOW v. WAINWRIGHT

22 Vt. 88. 1849.

ASSUMPSIT for the use and occupation of a store in Burlington. Plea, the general issue, and trial by the court, September Term, 1847,—*Bennett, J.*, presiding.

It appeared on trial, that the plaintiff was the owner of the store in question, and that the defendant, on the twenty-second day of July, 1841, hired it of the plaintiff, by parol agreement, for the term of five years, commencing from the first day of April, 1841, at an annual rent of \$125.00, one half payable on the first day of April and the residue on the first day of October in each year; that the defendant took possession of the store, under that agreement, and remained from two to four months, one Carlos Wainwright having charge of the store as his agent; that the defendant then formed a co-partnership with one Alonzo A. Wainwright, under the firm of E. & A. A. Wainwright, and the firm occupied the store for about two years, the rent being paid from the funds of the firm, during that time, by Carlos Wainwright, who still continued to have charge of the store, — but there was no evidence of any new agreement having been made between the plaintiff and the firm of E. & A. A. Wainwright in reference to the store; that then the firm of E. & A. A.

¹ *Lyons v. Phila. & Reading Ry. Co.*, 209 Pa. 550; *Rich v. Bolton*, 46 Vt. 84 (but compare *De Nottbeck v. Chapman*, 93 Vt. 378), accord. And see *Johnson v. Johnson*, 13 R. I. 467; *Doe d. Tomes v. Chamberlaine*, 5 M. & W. 14; *Davis v. McKinnon*, 31 U. C. Q. B. 564. Compare *Wilson v. Riffe*, 104 S. E. (W. Va.) 285.

Wainwright was dissolved, and the business at the store passed again into the hands of the defendant, and he occupied the store, without any new agreement, at the same rent, until the twenty-first or twenty-second day of July, 1844; that the defendant then left the store, and, on the twenty-second day of July, 1844, tendered to the plaintiff the possession and the key, and paid all the rent due to that day, but nothing beyond it, at the rate of \$125 per year; and that the plaintiff then declined to receive the possession of the store, and it remained vacant from that time until the twenty-eighth of November, 1844, when the plaintiff leased it, at a rent of \$135.00 per year, to another person, who went into the possession. It appeared, that during all the time the store was occupied as above stated, the rent had been paid semi-annually, on the first days in April and October in each year.

Upon these facts the plaintiff claimed to recover the rent of the store from the twenty-second day of July to the twenty-eighth day of November, 1844; during which period the store had remained vacant. The court decided, that the plaintiff was entitled to recover the rent from the twenty-second day of July to the first day of October, 1844, at the rate of \$125 per year, and rendered judgment accordingly. Exceptions by defendant.

The opinion of the court was delivered by

BENNETT, J. It seems from the bill of exceptions, that the defendant hired of the plaintiff his store, by a verbal contract, for the period of five years from the first of April, 1841, at an annual rent of one hundred and twenty-five dollars, payable semi-annually, on the first days of April and October in each year, and that the defendant went into possession, under the parol agreement, and the occupancy was continued until the twenty-first or twenty-second of July, 1844, when the defendant quit the possession of the store, and offered to give up the key and the possession to the plaintiff, which the plaintiff then declined to receive. The store remained vacant until the twenty-eighth of November, 1844, when the plaintiff leased it to another person, at an increased rent of ten dollars, who went into possession under his lease. The case further finds, that the rent had been semi-annually paid, on the first days of April and October, until the time when the defendant quit the possession in July, 1844. The County Court held, that the plaintiff should recover that portion of the half year's rent, falling due the first of October, 1844, which had not been paid; to which the defendant excepted.

Though in the court below the plaintiff claimed to recover rent to the time, when he took possession by his tenant, that is, to the twenty-eighth of November, 1844, yet there is no exception on his part; and the County Court, in disallowing the rent to the extent claimed, probably proceeded upon the ground, that the rent could not be *apportioned*. The correctness or incorrectness of such an opinion we are not now called upon to revise.

The only question now is, has the defendant any ground, upon which he can assign error. We think not. It is true, the Revised Statutes, chap. 60, § 21, declare, that all interests or estates in lands, created without any instrument in writing, shall have the force and effect of estates at will *only*; yet we think, that this estate, when once created, may, like any other estate *at will*, by subsequent events, be changed into a tenancy from year to year. In the case before us the lessee entered into possession, and the possession was continued from year to year, until July, 1844, and the rents semi-annually paid by the lessee and accepted by the landlord. From these facts a new agreement may well be presumed, and the estate, which was originally created by the Statute as an estate *only at will*, expands into a holding from year to year.

This is the settled doctrine of the English courts, under their Statute of Frauds, which enacts, that all parol leases of land shall have the force and effect of leases or estates *at will only*. See *Rigge v. Bell*, 5 T. R. 471. *Clayton v. Blakey*, 8 T. R. 3. *Doe v. Weller*, 7 T. R. 478. *Roe v. Rees*, 2 Bl. R. 1171. See, also, 2 Cow. 660, and 8 Cow. 227, in which the courts of New York declared the law of that State to be the same. We think the words of our Statute are satisfied by holding, that, *in the first instance*, the estate created in the present case was an estate at will, and only an estate at will, yet that it should inure, like other estates at will, and have the incidents common to an estate at will, one of which is its *convertibility* into a holding from year to year by the payment of rent. To go farther, and hold, that the estate, created under the Statute as an *estate at will*, must ever remain such, would be to go beyond the Statute, and evidently contravene its provisions, rather than obey them. The expression in the Statute, "shall have the force and effect of estates at will only," evidently implies, as we think, that they should in every respect inure as a lease at will.

This question is not altogether new in this State. In the case of *Hanchet v. Whitney*, 2 Aik. 240, it was held, that an estate at will created, under the Statute then in force, by means of a parol lease, having run for a period of five years, was converted into a tenancy from year to year. The provision of the Statute of 1797, then in force, was in effect the same as our present Statute.

We do not discover, that the sixth section of chapter 60 of the Revised Statutes, page 312, to which the court have been referred, has any special bearing upon the question. The provision in that section, that any lease for more than one year shall not be good and effectual against any other person than the lessor and his heirs, unless the same has been acknowledged and recorded, answers to a like provision in the fifth section of the Statute of 1797. The provisions of the Statute are the same as to deeds which remain unacknowledged and unrecorded.

I am aware, that in Massachusetts, in the case of *Ellis v. Paige*

et al., 1 Pick. 43, and in *Hollis v. Pool*, 3 Met. 551, it was held, that under their Statute of 1793 a person entering under a *parol* lease for any certain time shall not, even after occupation and payment of rent, be treated as a tenant from year to year, but shall at all times be regarded as a tenant at will. The Statute of Massachusetts is very similar in its phraseology to our Statute of 1797. It enacts, that *parol* leases shall have the effect of leases or estates *at will only*, and shall not, at law or equity, be deemed or taken to have any other or greater force and effect. Though the Statute of that State, as well as the Statute of this State, is decisive against the creation of a tenancy from year to year in the first instance, yet I do not see, how the reasoning of the court in those cases applies against the growth of an estate at will, created under the Statute, into a tenancy from year to year.

It is true, the English Statute of Frauds has an exception, as to leases not exceeding the term of three years; and this is dwelt upon by the court of Massachusetts, as a reason why the decisions of the courts in England, under their Statute, should not furnish a rule for them. I must confess, that I do not see the force of the reasoning of the court, which would prevent an estate at will from being turned into a tenancy from year to year in Massachusetts, and allow it under the English Statute. In the case of *Hanchet v. Whitney* it was not supposed, that our Statute of 1797 would have any other or greater effect, than the English Statute, and that both alike, in the first instance, declared that the estate created by a verbal lease was only an estate at will, unless it came within the exception of the English Statute, and that under our Statute it might be turned into a tenancy from year to year, as well as in England. The court of Maine, in the case of *Davis v. Thompson*, 13 Maine, 214, under a similar Statute, have followed the Massachusetts cases; but no new views on the question are presented, and for myself I cannot coincide with those cases.

It is said by Tindal, C. J., in 7 Bing. 458, that "if a party enters and pays rent, a new agreement may be presumed," and that this is the ground of turning the tenancy into a holding from year to year. See, also, *Cox v. Bent*, 5 Bing. 185. In such case the tenant is entitled to six months' notice, ending with the expiration of the year; and without this the landlord cannot eject him. From this it should follow, that the defendant could not, at any time during the year, at pleasure, surrender the premises against the will of his landlord, and thus excuse himself from the payment of accruing rent.

But suppose we regard the continuing interest of the defendant in the store to be still only that of a tenant at will, does it follow, that the defendant could have the right at any time, *without previous notice*, to determine his estate, and thus excuse himself from all liability to accruing rents? And could he especially do it in this case, at least, until the six months' rent, to become due the first of Octo-

ber, 1844, had fully accrued? He had seen fit to hold over after the first of April, 1844, and could he determine his estate, while the next six months were running, and thereby acquire the right to apportion the six months' rent then accruing? But for myself I do not deem it important to recur to this ground. I am fully satisfied to treat it as a tenancy from year to year.

It is no defence in this case, that the defendant abandoned the possession of the store. If the tenancy remained undetermined, he is liable for rent, whether he in fact occupied the store, or not. 3 Steph. N. P. 2724. *Redpath v. Roberts*, 3 Esp. R. 225. The plaintiff, however, cannot claim rent from this defendant after his lease of the twenty-eighth of November, 1844; and the County Court limited his right to recover rent ending with the six months' rent due the first of October, 1844, and this, no doubt, upon the ground, that the plaintiff could not determine the tenancy, while the next six months were running, and thus acquire the right of *apportionment*. The plaintiff re-posessed himself of the store by and through his new tenant.

The fact, that the defendant, after having been in possession a few months, took a partner in the business carried on in the store, cannot alter the case. No new agreement was made, in relation to the occupancy of the store, with the plaintiff. The partner of the defendant might well be considered, for the time being, as in under him, at least, as a *quasi* tenant. Besides it appears, that after about two years the partners dissolved their connection, and the store was again occupied by the defendant individually.

We then think, the court below were right in their view of the law, and that, although the contract was modified, yet it was not entirely destroyed, and should govern the rights of the parties, as to the amount of rent, and the times when the same became payable. See *Schuyler v. Leggett*, 2 Cow. 660.

The result is, the judgment of the County Court is *affirmed*.¹

ELLIS v. PAIGE

1 Pick. (Mass.), 43. 1822.

THIS was an action of trespass *quare clausam fregit*.

At the trial before *Wilde, J.*, in May Term, 1821, the plaintiff introduced evidence tending to prove that in April, 1819, Paige, as the

¹ See *Hammon v. Douglas*, 50 Mo. 434; *Balt. & O. Ry. Co. v. West*, 57 Ohio St. 161.

Entry under a void lease and payment of rent at an annual rate creates a tenancy from year to year. *Laughran v. Smith*, 75 N. Y. 205; *Peters v. Holder*, 40 Okl. 93; *Dumn v. Rothermel*, 112 Pa. 272; *Arbenz v. Exley Co.*, 52 W. Va. 476; *Arden v. Sullivan*, 14 Q. B. 832.

agent of one Bond, leased to the plaintiff by parol a parcel of land, with a dwelling-house standing thereon, in Ware, for the term of one year, reserving rent; that Ellis thereupon went into possession; and that on the 30th of September, Paige forcibly entered into the dwelling-house, and with the aid of the other defendants, without the consent, and against the will of the plaintiff, removed the wife and the property of the plaintiff therefrom into the highway. The plaintiff attempted also to prove that the door of the house was broken by Paige, but there was some reason to believe that it was first partially opened by the wife of the plaintiff, and that Paige, taking advantage of this partial opening, forcibly effected his entrance without any actual breaking. It appeared that either on the 17th, or on the 20th of September, Paige, as the agent of Bond, gave notice to the plaintiff to quit the demised premises.

Upon this evidence the jury were instructed, that if they believed ✓ that the door of the house was found by Paige wholly or partly open, so that he entered without any actual breaking, the plaintiff was not entitled to recover:—that under the Statute of this Commonwealth, this parol lease for a year was to be considered as a lease at will, and the will of the lessor having been determined by the notice to quit, trespass *quare clausam* could not be maintained by Ellis for any entry by the landlord, or his agent, subsequent to this notice; and though within a reasonable period after the determination of the tenancy at will, the tenant might be entitled to free ingress and egress for the purpose of effecting his removal, or, in other words, to reasonable notice to quit, yet what notice was reasonable, was a question of law:—and that the notice which had been proved, whether given on the 17th, or the 20th of September, was reasonable notice.

The jury found a verdict for the defendants. If these instructions were incorrect, a new trial was to be granted.

The case was argued at September Term, 1821, and continued for advisement.

The opinion of the court was delivered at April Term, 1823, at Northampton, by:

WILDE, J. The first question to be determined is, whether a parol lease for a year is valid according to the terms of it, or whether it is an estate at will only.

By the Statute of 1783, c. 37, § 1, it is enacted, that all leases by parol, and not put in writing and signed by the parties so making the same, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect.

The language of the Statute is plain and unambiguous, and when such is the case, the will of the legislature must be obeyed. That will could not have been expressed with more perfect clearness. But it has been argued that a judicial construction has been given to an

English Statute nearly similar, (29 Car. 2, c. 3,) according to which it is held by the courts there, that parol leases for an uncertain time, with the reservation of an annual rent, may be good as leases from year to year, notwithstanding the Statute. And it is said that the legislature here, in adopting the same language, must have intended to adopt the same construction. This argument would have weight, if the two Statutes were in all respects similar.

But there is an exception in the English Statute, in favor of parol leases not exceeding the term of three years, which was adopted here in the provincial St. 4 W. & M. The omission of it in the Statute now in force, shows plainly the intent of the legislature, to place all parol leases on the same footing.

It is a well settled rule, that when any Statute is revised, or one Act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. We are not therefore at liberty to suppose that the proviso or exception in the provincial Statute was omitted by mistake; and if not, then clearly it was the intention of the legislature, to place all parol demises on the same footing; for such is the obvious import of the language of the Statute of Frauds.

That the doctrine as to tenancies from year to year, depends upon the exception in the English Statute, appears to me very clear, although but little is to be found in the books on this point. In the case of *Legg v. Strudwick*, 1 Salk. 414, it was decided that a parol demise *habendum de anno in annum, et sic ultra, quamdiu ambabus partibus placeret*, was a lease for two years, and from year to year after; so that if the tenant holds on after the two years, he is not tenant at will, but for a year certain.

The court say, "that his holding on after the two years must be taken to be an agreement to the original contract, and in execution of it. And such an executory contract," they say, "is not void by the Statute of Frauds, though it be for more than three years; because there is no term for above two years ever subsisting at the same time." The plain inference is, that but for the exception in the Statute, the lease in that case would have been held a lease at will only. The doctrine, as to tenancies from year to year, was introduced long before the Statute of Frauds. In the case of *Doe v. Porter*, 3 D. & E. 16, Lord Kenyon says, "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the courts very early raised an implied contract for a year, and added, that the tenant could not be removed at the end of the year without receiving six months' previous notice." At first a lease without limitation of time, and with the reservation of an annual rent, was considered as a lease for a year certain. This was better than the old tenancy at will, but still

inconvenient, because the tenant might be compelled to quit at the end of the year without notice. *Timmins v. Rowlinson*, 1 W. Bl. 533; s. c. 3 Burr, 1609. Then followed tenancies from year to year, which were found most inconvenient, as the estate could not be suddenly determined, nor without six months' notice to quit. Thus stood the law at the time the English Statute of Frauds was penned, and the exception was introduced, no doubt, for the purpose of supporting short parol leases, and tenancies from year to year depending on implied contracts. But whether this be so or not, it is very clear, that the English doctrine respecting tenancies from year to year can only be supported by the exception in the Statute, and that by our Statute there can be no tenancy from year to year, unless by a lease in writing. But the case under consideration, is not a case of tenancy from year to year, even according to the English doctrine. It is a case of a parol demise for a year certain; and in England, and in New York, where the law is the same, such a parol demise would be valid. If the tenant should hold over after the year, he would then be tenant from year to year, and would be entitled to notice.

If there be a lease for a year, and by consent of both parties, the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. The plaintiff therefore would not by the law of England be entitled to notice to quit.

Where a lease is determinable at a certain time, no notice to quit is necessary; because, says Lord Mansfield, both parties are equally apprised of the determination of the term. *Messenger v. Armstrong*, 1 D. & E. 54; *Bright v. Darby*, 1 D. & E. 162. All that is said therefore about tenancies from year to year, and the necessity of a notice to quit in every such tenancy, is not applicable to the present case.

2. The next question to be considered, is, whether a tenant at will is entitled to notice to quit.

I hold that he is not; and this is the principal objection to a tenancy at will. Notice to quit is frequently given, and is one way of determining the lease; but not the only one. It may be determined by the entry of the lessor on the land, and his exercising any act of ownership inconsistent with the nature of the estate; or by the death or outlawry of either landlord or tenant. And either party may determine the estate whenever he pleases.

This is clearly the law, notwithstanding the case of *Parker v. Constable*, 3 Wils. 25, which is a short and imperfect report. I presume that was a tenancy from year to year: for at the time it was decided (10 Geo. 3), the old tenancy at will had in England become obsolete. It existed only notionally, as Wilmot, J., said long before. If this is not a satisfactory explanation of that case, it is sufficient to add, that it is opposed to the whole current of the authorities. In the case of *Phillips v. Covert*, 7 Johns. Rep. 1, Kent, C. J., says, "that tenancies at will are held to be estates from year to year, merely for the

sake of a notice to quit; as to every other purpose they are regarded as mere tenancies at will." And with this agree all the *dicta* of the English judges. Thompson, J., says that it has been settled in New York, that notice to quit is not necessary to a tenant at will. *Jackson v. Bryan*, 1 Johns. Rep. 323. And Spencer, J., says, that whether notice to quit in that case was necessary, depended on the question, whether the estate was a tenancy at will, or for years. Tomkins, J., it is true inclined to the opinion, that a tenant at will is entitled to notice to quit; and he relies on the case of *Parker v. Constable*, which he says he did not find had been overruled. And it ought not to be, if it is to be understood as I have supposed it might be. He refers also to the case of *Rigge v. Bell*, 5 D. & E. 471; but that case will not warrant the conclusion he seems to draw from it. Notice to quit was not held necessary in that case on the ground that the defendant was tenant at will, but because by the terms of the lease he was to hold for a time certain. It was a case of a parol demise for the term of seven years, which the court held void by the Statute of Frauds, as to the duration of the lease, but good as to the other terms of it. One of these terms was, that the defendant should quit at Candlemas, and the court decided, that if the lessor chose to determine the tenancy before the expiration of the seven years, he could only put an end to it at Candlemas. This was the only point decided in that case. In the case of *Jackson v. Laughhead*, 2 Johns. Rep. 75, it was decided by a majority of the court, against the opinion of Thompson, J., that in ejectment against a mortgagor, notice to quit was necessary. This was never held to be law in this State; nor is it the law of England.

Lord Mansfield says, in the case of *Keech v. Hall*, Doug. 21, that "when the mortgagor is left in possession, the true inference to be drawn, is, an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit." The same doctrine is laid down by Lord Ellenborough in the case of *Thunder v. Belcher*, 3 East, 449; and such I think is unquestionably the law. A mortgagor is not entitled to emblements, much less to six months' notice to quit.

It appears, therefore, from a review of all the authorities, that an estate at will may be determined without previous notice; that the inconvenience arising from this principle of the common law, led in England to the introduction of the tenancy from year to year; and that notice to quit, as practised there, is required only in relation to the latter estate.

3. The question then is, whether, when an estate is determined by the lessor, the lessee is obliged immediately to quit, or may be forcibly expelled.

We are all of opinion that the law does not impose on the lessee these hard terms.

The lessee is entitled to the emblements, and a reasonable time is

allowed to him for the purpose of removing his family, furniture, and other property. If the lessor disturbs him in the exercise of this right, an action will lie for the lessee. This principle was recognized in the case of *Rising v. Stannard*, 17 Mass. Rep. 287, and is well established. A contrary doctrine would be extremely harsh and unreasonable.

4. Nothing further then remains to be considered, except the question, whether there was, in this case, sufficient and reasonable time allowed the tenant to remove: and this we have found to be a question of no small difficulty. There being no rule established, each case must depend on its own peculiar circumstances. This, to say the least of it, is inconvenient. No right which is capable of being defined and limited, ought ever to depend on the discretion of the judges; the exercise of which necessarily leads to uncertainty, which is commonly productive of more difficulty than even the operation of a bad rule. It is for this reason that the court adopts rules of practice, instead of exercising its discretion in each particular case.

We shall hereafter probably find it necessary to frame some rule applicable to cases of this sort; should we not be prevented by the intervention of the legislature, whose unlimited power to change and modify the law would enable them most effectually to provide a remedy for existing inconveniences and difficulties. These probably were not foreseen when the provincial Statute was revised; and perhaps the operation of the exception or proviso in that Statute was not well understood or considered. At that time the doctrine of leases and tenancies at will was not familiar in practice, and the exception itself is somewhat obscure.

This case, however, must be decided by the law as it now is; and a majority of the court think that a reasonable time was not given to the tenant to remove, and that for this reason a new trial must be granted. What will be the opinion of the court after another trial cannot be now determined. On a fuller report of the case on this point, perhaps the court may be of opinion that time enough was allowed. This must depend on the circumstances of the case, which do not at present sufficiently appear by the report.

*New trial granted.*¹

¹ JACKSON, J., and PUTNAM, J., were of opinion that notice to quit was necessary. The opinion of Mr. Justice Putnam is given in a note to *Coffin v. Lunt*, 2 Pick. (Mass.) 70, 71.

Compare *Carlisle v. Weiskopf*, 237 Mass. 183; *Crowe v. Bixby*, 237 Mass. 249.

As to the law in Maine, see *Davis v. Thompson*, 13 Me. 209; *Young v. Young*, 36 Me. 133; *Withers v. Larrabee*, 48 Me. 570; *Estey v. Baker*, 50 Me. 325; *Seavey v. Cloudman*, 90 Me. 536.

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CURTIS v. GALVIN

1 All. (Mass.) 215. 1861.

TORT for entering the plaintiff's dwelling-house, and removing his furniture and ejecting his family therefrom. The defendants proved, in justification, that the defendant Galvin, being the owner of the premises, conveyed them by deed to the other defendant Carney, and that, eight days before the acts complained of, Carney informed the plaintiff thereof, and gave him notice to quit. At the trial in the Superior Court, *Rockwell, J.*, directed a nonsuit, and the plaintiff alleged exceptions. The facts appear more fully in the opinion.

BIGELOW, C. J. It appears by the testimony of the plaintiff that, in October, 1858, prior to the alleged trespass, the premises from which he was ejected belonged to Galvin. Inasmuch as he offered no evidence of any right to their occupation created by an instrument in writing, he could have no greater title or interest therein than an estate at will. Rev. Sts. c. 59, § 29. On the facts stated in the exceptions, this is the most favorable view which can be taken of his right to the possession and enjoyment of the premises, prior to the conveyance to the defendant Carney. But, on a familiar and well-settled rule of law, this tenancy at will was determined, and the plaintiff became a tenant by sufferance only by the conveyance from Galvin to Carney, the other defendant, on the 9th of said October. *Howard v. Merriam*, 5 Cush. 563, 574; *McFarland v. Chase*, 7 Gray, 462.

The evidence offered by the plaintiff to impeach this conveyance, and to show that it was colorable, and was in fact made for the purpose of enabling the said Galvin to eject the plaintiff from the premises, was rightly rejected. The deed was a valid one as between the parties. It passed the title to the premises. The grantor had no power to compel the grantee to surrender the estate conveyed to him. It violated the legal rights of no person. It is true that a creditor of the grantor, who could show that he was thereby hindered, delayed and defrauded of the collection of his debt, or a subsequent purchaser without notice, who could prove that the deed was made with intent to defraud him, might impeach the conveyance, and set it aside on the well-settled principles of the common law as declared in Sts. 13 Eliz. c. 5, § 2, and 27 Eliz. c. 4, § 2. But in such case the deed is valid between the parties; and, with this exception, we know of no rule of law which restrains the owner in fee from the free and unfettered alienation of his estate. It is only an exercise of a legal right, which works no injury to any one, least of all to a person who holds under the grantor. He took his estate or interest in the premises subject to all the legal rights of the owner therein, and must be presumed to have known them, and to have assented

thereto. To him, therefore, the maxim *volenti non fit injuria* is applicable. The determination of an estate at will, by an alienation by the owner of the reversion, is one of the legal incidents of such an estate, to which the right of the lessee therein is subject, and by which it may be as effectually terminated as by a notice to quit given according to the requisitions of the Statute. Indeed it is difficult to see upon what ground a deed can be held void, as being colorable or fraudulent, which is made in the exercise of a legal right, and which has no effect on the rights of a third party, who seeks to set it aside, other than that which was necessarily incident to the estate which he held in the premises. The *dictum* of the court in *Howard v. Merriam, ubi supra*, cited by the counsel for the plaintiff, was not essential to the decision of that case, and cannot be supported on principle or authority.

It follows that, after the conveyance of the demised premises, the plaintiff became tenant by sufferance only, and could not maintain this action of tort in the nature of trespass *quare clausam* against the defendant Carney, who was the grantee in the deed; nor against the other defendant, who acted under his authority in attempting to eject the plaintiff from the premises. At the time of action brought, it was not the plaintiff's close. A tenant by sufferance holds possession wrongfully. Co. Lit. 57 b, 271 a. The defendants had a full right of entry. *Meader v. Stone*, 7 Met. 147.

*Exceptions overruled.*¹

PERRY AND OTHERS v. ROCKLAND AND ROCKPORT
LIME CO.

94 Me. 325. 1900.

ON REPORT. ✓

This was a bill in equity, heard on bill, answer and proofs to compel the defendant, who is the present owner of a lime quarry, known as the Blackington farm and quarries, in Thomaston, to

¹ " Estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party; and if the rent reserved is payable at periods of less than three months, the time of such notice shall be sufficient if it is equal to the interval between the days of payment; and in case of neglect or refusal to pay the rent due from a tenant at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the tenancy." Massachusetts, Gen. Laws (1920), c. 186, § 12, modelled on Acts 1825, c. 89, § 4. For temporary relief to tenants, see Acts 1919, c. 257; Acts 1920, cc. 538, 554; 555; 577; 578.

See *Pratt v. Farrar*, 10 All. (Mass.) 519; *DeWolfe v. Roberts*, 229 Mass. 410; *Gavin v. Durden Co.*, 229 Mass. 576; *Newman v. Sussman*, 131 N. E. (Mass.) 926.

NOTE—As to tenancies for periods of less than a year, see *Steffens v. Earl*, 40 N. J. L. 128; *Bowen v. Anderson*, [1894] 1 Q. B. 164; 1 Taylor Landl. and Ten., 9th ed., § 57; 1 Tiffany, Landl. and Ten., pp. 132-138.

make, execute, acknowledge and deliver to the plaintiffs a lease of the same for the term ending April 16, 1906.

The facts appear in the opinion.

SITTING: WISWELL, C. J., EMERY, HASKELL, WHITEHOUSE, STROUT, FOGLER, JJ.

STROUT, J. On April 16th, 1898, the then owners of a lime-rock quarry, leased a portion of it to the plaintiffs for the term of one year from that date. The rights of the parties to this suit depend upon the clause in the lease, which reads:—“The term of this lease shall be one year from the sixteenth day of April, A. D. 1898, with the privilege to the said Perry Brothers of renewing the same on the same terms for one, two, three, four, five, six, or seven years additional.”

✓ Neither during the term of one year, nor at its termination, did the plaintiffs give any notice to the lessors of an intention to renew, or continue occupancy of the quarry, for either of the periods as to which they had an election. But they did in fact remain in possession thereafter, to which the lessors made no objection. Shortly before the expiration of the year's term, plaintiffs removed to this quarry and set up a boiler in place of one before used. The rent reserved was four cents net stumpage per cask for all good stock quarried, and was payable on the first day of January each year. ✓ Rent has been paid to the first day of January, 1900, to the then owners. In May, 1899, the title to three-fourths of the quarry became vested in William T. Cobb, trustee, who by his deeds of June 7th and June 26th, 1899, conveyed it by quitclaim to the Penobscot Bay Manufacturing Company, which company conveyed it by warranty deed to the defendant on January 18th, 1900. And on the fifth day of March, 1900, the remaining one-fourth was conveyed to the defendant.

The deeds to Cobb contained the provision: “This conveyance is subject to a lease of a portion of said quarry and real estate from this grantor to Perry Brothers, dated April 16th, 1898, and all right, title and interest in and to said lease, together with the rentals therefrom accruing after June 1, 1899, are hereby assigned and transferred to the said Cobb, as trustee.” A similar provision is contained in the deeds from Cobb to the Penobscot Bay Manufacturing Company. In the deed from that company to the defendant is the clause:—“And also subject to any existing rights under a writing or lease to Perry Brothers, dated April 16, 1898, and all right, title and interest of the said Penobscot Bay Manufacturing Company in, to, or under and by virtue of said writing or lease, together with the rentals hereafter accruing therefrom, are hereby assigned, set over, transferred and conveyed to the grantee.” No similar provision was contained in the deed of one-fourth from Frohock and others.

The defendants therefore must be regarded as taking title with notice of whatever rights, if any, plaintiffs then had, but their rights were not thereby enlarged.

Under the lease, plaintiffs had the right to renew or extend the lease for one, two, three, four, five, six or seven years at their option. They had one right of election and only one, to be exercised by the will of the plaintiffs communicated to the lessors or the then owners of the reversion. *Cunningham v. Pattee*, 99 Mass. 252. Good faith, fair dealing, as well as the law, required that the election should be made during the original term of the lease, or at its expiration. *Renaud v. Daskam*, 34 Conn. 512; *Thiebaud v. First Nat. Bank*, 42 Ind. 222; *Darling v. Hoban*, 53 Mich. 599; *Shamp v. White*, 106 Cal. 221.

Notwithstanding the fact that, shortly before the expiration of the specific term of the lease, plaintiffs placed in the quarry another boiler, the evidence satisfies us that neither at that time, nor at the expiration of the year, had the plaintiffs arrived at the conclusion to have their term extended for any definite time. . . .

Nine months after the expiration of the year's term in the lease, plaintiffs notified defendant in writing that they had elected to continue the lease, but not specifying for what term. Enclosed with this notice was draft of a lease for seven years, which plaintiffs asked to have executed. Defendant declined to execute the proposed lease, and distinctly claimed that plaintiffs' option terminated at the end of the first year; and that plaintiffs having failed to exercise their option, their right had expired, and claimed possession of the mine on April 16th, 1900. This notice of the exercise of plaintiffs' option was too late. The term of the lease had expired. Plaintiffs had failed to exercise seasonably their option, and the right to do so had terminated, yet plaintiffs remained in possession and were not ejected by the then owners, as they might have been, and rent was paid to the then owners and accepted by them until January 1st, 1900. No rent has been paid to or accepted by defendant.

It is strenuously argued that by thus holding over by consent of the reversioner, the plaintiffs had exercised their election and perfected their right to an extended term for the extreme period of seven years. The cases cited do not sustain such broad claim. In *Kramer v. Cook*, 7 Gray 550, the lease gave an election to lessee to extend for a further definite term at an increased rental. The tenant held over and paid two quarters rent at the increased rate. This was rightly held to justify the inference of election. In *Hersey v. Giblett*, 18 Beavan, 174, Hughes agreed to let and Hersey to take a house "as a yearly tenant," and "should Hersey wish for a lease of the premises, Hughes will grant the same for seven, fourteen or twenty-one years." Hersey occupied for seven years, and then called for a lease, and filed a bill for specific performance. It

was held that the contract created a tenancy from year to year, with an option to the lessee to ask for a lease from the beginning for twenty-one years, determinable at his option for seven or fourteen.

In some jurisdictions it is held that, where the lease authorized a renewal or extension for a definite term, holding over by consent amounts to an election to hold for the extended term. So held in *Terstegge v. First German Ben. Society*, 92 Ind. 82; *Delashman v. Berry*, 20 Mich. 292; *Insurance & Law Building Co. v. Missouri Bank*, 71 Mo. 58; *McBrier v. Marshall*, 126 Pa. St. 390. But the Indiana court held in *Whetstone v. Davis*, 34 Ind. 510, and *Folley v. Giles*, 29 Ind. 114, that where the lease provided for a term of one year, with the privilege of the premises for two or three years, holding over after the first year operated only as an election to hold for one year. In *Buckland v. Papillon*, 2 Law Reports, Chancery Appeals, 67, there was an agreement to let certain premises for three years, and also when called upon by the tenant to grant him a lease for three years, seven years or the whole term. Under that agreement it was held that the option was not gone at the end of the three years. It could hardly have been held otherwise. Numerous cases are cited by counsel, to which we do not specifically refer, as they afford no additional aid in the solution of the question involved here.

The insuperable difficulty in this case is, that the option to extend the lease was not for a definite period, but for any number of years not exceeding seven which the plaintiff should desire. If the holding over was evidence of an election, for how long a term was it? Suppose within the second year the tenant had vacated, could the landlord recover rent for the seven years? Or would the tenant be allowed to say he elected to hold for one year only?

Some courts make a distinction between a right to renew a lease, and the privilege of extension — treating the former as a covenant, requiring a new lease, and the latter, if the option is exercised, as a holding under the original demise.¹ In this state, such distinction is not regarded; in either case, the additional term is treated as arising from the original demise. *Willoughby v. Atkinson Co.*, 93 Maine, 186.²

¹ See *Renoud v. Daskam*, 34 Conn. 512; *City Coal Co. v. Marcus*, 111 Atl. (Conn.) 857; *Hamby v. Georgia Iron Co.*, 127 Ga. 792; *Vincent v. Laurent*, 165 Ill. App. 397; *Thiebaud v. Bank*, 42 Ind. 212; *Andrews v. Marshall Co.*, 118 Iowa 595; *Grant v. Collins*, 157 Ky. 36; *Miller v. Albany Lodge*, 168 Ky. 755; *Leavitt v. Maykel*, 203 Mass. 506; *Kuhlman v. Lemp Co.*, 87 Neb. 72, 88 Neb. 1; *Huger v. Dibble*, 8 Rich. L. (S. C.) 222; *Whalen v. Manley*, 68 W. Va. 328.

² See *Caley v. Thornquist*, 89 Minn. 348; *Insurance Co. v. Bank*, 71 Mo. 58; *Kelso v. Kelly*, 1 Daly (N. Y.) 419; *Harding v. Seeley*, 148 Pa. 20; *Henry v. Bruhn*, 110 Wash. 321.

Authorities are collected in 29 L. R. A. N. S. 174 note; L. R. A. 1916 E. 1232 note, 1237 note.

At common law under a lease for a year or a term of years, holding over by the tenant, by consent of landlord, created a tenancy from year to year, and mere holding over without consent, a tenancy at sufferance. But under our statutes, holding over after expiration of the term creates a tenancy at will. *Franklin Land Co. v. Card*, 84 Maine, 532.

Kendall v. Moore, 30 Maine, 330, was a case where under a lease for a year, the tenant held over about six months and paid one quarter's rent. The landlord claimed rent for the entire year, but the court held that the lessee was tenant at will, and not liable for rent beyond the time of his occupancy.

The plaintiffs in this case failed to make seasonably an election to have the lease extended, and the term therefore ended on April 16th, 1899. Thereafterward they held the premises as tenant at will to the then owners. The conveyances of title to the defendant in January and March, 1900, terminated their tenancy and all right of possession. *Seavey v. Cloudman*, 90 Maine, 536.

Defendant has never recognized the plaintiffs as its tenant. Their holding therefore is without right.

*Bill dismissed with costs.*¹

¹ But see *Anderson v. Dodsworth*, 292 Ill. 335; *Falley v. Giles*, 29 Ind. 114; *Trustees of Orphan House v. Hoyle*, 79 Misc. (N. Y.) 301.

NOTE.—On the constitutionality of recent statutes passed to ameliorate housing conditions, see *Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; 11 A. L. R. 1252 note.

SECTION II

COVENANTS. AND HEREIN OF PERMISSIVE WASTE

HART v. WINDSOR

12 M. & W. 68. 1843.

DEBT. — The declaration alleged, that whereas theretofore, to wit, on the 23d June, 1843, by a certain memorandum of agreement made and entered into between the plaintiff of the one part, and the defendant of the other part, the plaintiff agreed to let, and the defendant agreed to hire and take of the plaintiff, a certain *messuage or tenement and garden ground*, in the said memorandum of agreement particularly mentioned and described, with the use of several fixtures and things therein, for the term of three years from the 24th of June then instant, at the yearly rent of £50, payable quarterly, on the 29th of September, the 25th of December, the 25th of March, and the 24th of June, in each year of the said term, free from all deductions whatsoever; the first payment thereof to be made on the 29th of September then next ensuing, the plaintiff paying all rates and taxes in respect of the said premises, and the defendant paying all personal rates and taxes; and the defendant, amongst other things, agreed to *preserve* the said messuage or tenement and premises in good and tenantable repair and condition, and to deliver up the said messuage or tenement and premises in like repair and condition, together with all the keys, fixtures, and other things thereupon or belonging thereto, (reasonable wear and tear and damage by fire only excepted), at the end or other sooner determination of the said term of three years, as by the agreement fully appears; by virtue of which said agreement the defendant then entered into and became possessed of the said messuage or tenement and premises, and was and continued possessed thereof from the said 24th of June, 1843, until and upon the 29th of September in the same year, when a large sum of money, to wit, 12*l.* 10*s.* of the rent aforesaid, for one quarter of a year of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable from the defendant to the plaintiff, under and by virtue of the said agreement, and still is in arrear and unpaid to the plaintiff, whereby, &c.

Pleas: first, a traverse of the agreement stated in the declaration; secondly, that the said messuage or tenement was so demised and let to the defendant for the purpose of his inhabiting the same, and dwelling therein during the said term: and that before and at the

time of making the said agreement, and also at the time when the defendant entered into and became possessed of the messuage or tenement and premises, as in the declaration alleged, and from thence until and at the time of the defendant's quitting, vacating, and abandoning the possession of the same, as hereinafter mentioned, the said messuage or tenement was not in a reasonable, fit, and proper state or condition for habitation or dwelling therein; and the same was then, and during all the time aforesaid, in that state and condition that the defendant could not reasonably inhabit or dwell therein, or have any beneficial use or occupation of the same, for and by reason of the same being greatly infested, swarmed, and overrun with noxious, stinking, and nasty insects, called bugs, and not for or by reason of any act, default, or omission of the defendant; and the defendant, before or at the time of his making the said agreement, had no notice or knowledge thereof; and the defendant afterwards, and after he so entered and became possessed of the said messuage or tenement, and before the said sum of 12*l.* 10 *s.*, or any part thereof, became due or payable, to wit, on the 25th of June, 1843, discovered and first had notice of the said state and condition of the said messuage or tenement, and of the same being so infested, swarmed, and overrun with bugs as aforesaid; and thereupon the defendant upon such discovery and notice, and before the said sum of 12*l.* 10*s.*, or any part thereof, became due or payable, to wit, on the day and year last aforesaid, quitted, vacated, and abandoned the possession, and wholly ceased and abstained from all further occupation or possession of the said messuage or tenement and premises so demised as aforesaid, and then gave notice of the premises to the plaintiff of the defendant's having so quitted, vacated, and abandoned the possession of the said messuage or tenement and premises, and suffered and permitted him to take and have and retain, and he could and might have taken and retained, possession of the said messuage or tenement and premises; and the defendant from thence hitherto hath ceased all further possession, use, or occupation of the said messuage or tenement and premises, and not derived any benefit therefrom; and that at and from the time of the commencement of the said term, until the time of his so quitting, vacating, and abandoning possession of the said messuage or tenement and premises, and ceasing all further occupation thereof, he had no beneficial use or occupation whatever of the same. Verification.

Thirdly, that he was induced and persuaded to make, and did make and enter into, the said agreement and promise in the said declaration mentioned, by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Verification.

Replication to the second plea, *de injuriâ*; and to the third, that the defendant was not induced to make, and did not make or enter into the said agreement by the fraud, covin, or misrepresentation in the plea mentioned.

The cause was tried before *Rolfe*, B., at the sittings in Hilary Term, 1844, when the facts alleged in the second plea having been fully proved, a verdict was found for the defendant on the issue raised by that plea. *C. G. Addison*, on a subsequent day in the same term, obtained a rule for judgment *non obstante veredicto*, on the ground that the facts stated in the plea were no answer to the action.

The judgment of the Court was now delivered by

PARKER, B. — This was a case very fully and ably argued a few days ago, upon shewing cause against a rule for judgment *non obstante veredicto*. The declaration is not for use and occupation, but on an agreement in the nature of a lease. [His Lordship here read the declaration and the second plea.] The question is, whether the plea contains substantially a good answer to the plaintiff's claim for a quarter's rent, becoming due after the defendant quitted.

On the part of the plaintiff, it was insisted that it did not, for several reasons; the principal one being, that where there is an actual demise of the unfurnished fabric of a specific messuage for a term, there is no contract implied by law on the part of the lessor, that the messuage was at the time of the demise, or should be at the commencement of the term, in a reasonably fit and proper state and condition for habitation (that is, so far as concerned the fabric), though it was demised and let *for the purpose* of immediate habitation. As we are all of opinion in favour of the plaintiff upon this objection, it is unnecessary to observe upon the others in detail; but it may not be useless to remark, that two of them are very important, and have not been satisfactorily answered; viz., that if such a contract is implied by law, it would be no defence, where the tenant has actually occupied; his remedy would be by a cross action; and to constitute a valid defence on the ground of the breach of this contract, the law must give also a right to abandon the lease upon the breach of it; that is, to make a defence, the law must imply, not merely a contract, but a condition that the lease should be void if the house was unfit for occupation. The cases cited from Brooke's Abr. "Dette," 18 and 72, are decisive, that where the lessor is bound by the custom of London, or by covenant, to repair, and does not, the tenant cannot quit. The other objection, which we think right to notice, is, that in this case the house and some *garden ground* are both demised; and to make the plea good, it must be held, that, if a messuage be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for habitation, as that its breach would authorize the tenant to give up both. Whether, if there were such a contract or condition implied by law, generally, it would be implied in this case, where the defendant agrees to *preserve* in tenantable condition, is a question on which it is quite unnecessary to enter.

The point to be considered, then, is, whether *the law* implies any contract as to the condition of the property demised, where there

is a lease of a certain ascertained subject, being real property, and that lease is made for a particular object.

The question relates to a case of actual demise of a specific tenement, and we have not to inquire what the obligations of a party would be under an executory agreement, to procure a lease of *some* house for the habitation of another; nor whether the defendant would not be exonerated on the ground of fraud in the plaintiff, if the plaintiff knew of the defect in the house himself, and that the defendant would not have taken the house if he knew it; nor have we to consider whether the defendant would be responsible, if at the time of the demise there was no house at all — he may be, by reason of the implied contract for title to *a house*, not the land merely: which imports that the subject of the contract exists. The simple question is, what is the implied obligation on the part of the landlord to his tenant, under a lease of a house for years.

Considering this case without reference to the modern authorities, which are said to be at variance, it is clear that from the word “demise,” in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word “let,” or any equivalent words, (Shepp. Touch 272), which constitute a lease, have, no doubt, the same effect, but not more. Shepp. Touch. 165, 167. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many, which clearly shew that there is no implied contract that the property shall *continue* fit for the purpose for which it is demised; as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down, or destroyed by fire, *Monk v. Cooper*, 2 Stra. 763, *Balfour v. Weston*, 1 T. R. 310, and *Ainsley v. Rutter* there cited; or gained upon by the sea, *Taverner's case*, Dyer, 56 a; or the occupation rendered impracticable by the king's enemies, *Paradine v. Jane*, Alleyn, 26; or where a wharf demised was swept away by the Thames, *Carter v. Cummings*, cited in 1 Chanc. Ca. 84. In all these cases, the estate of the lessor continues, and that is all the lessor impliedly warrants.

It appears, therefore, to us to be clear upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.

But the defendant's counsel rely upon some modern decisions in support of the positions which they are to maintain. It is not necessary to refer to the cases on the implied warranty of chattels, further than to say that the rule of the common law, which prevails in gen-

eral, Co. Lit. 102 a., that there is no implied warranty on the sale of specific goods, has had exceptions engrafted upon it, where the goods are ordered from a manufacturer, or tradesman, who impliedly engages to use a proper degree of skill and care in constructing or supplying them. Such are the cases of *Brown v. Edgington*, 2 Man. & Gr. 279; 2 Scott N. R. 496, *Shepherd v. Pybus*, 3 Man. & Gr. 868; 4 Scott N. R. 434, and others. These have no bearing on the present case.

But the defendant chiefly rests his case upon the decision of *Smith v. Marrable*, 11 M. & W. 5. My judgment in that case certainly proceeded upon the authority of two previous decisions, which, though they contained a novel doctrine, had not been questioned in Westminster Hall, and had received, to a certain degree, the sanction of the Lord Chief Justice Tindal, in a subsequent case. Those cases were *Edwards v. Etherington*, before Lord Tenterden, and afterwards the Court of King's Bench, Ry. & M. 268, and 7 D. & R. 117, and *Collins v. Barrow*, 1 M. & Rob. 112; and the last, that before Lord Chief Justice Tindal, was *Salisbury v. Marshall*, 4 Car. & P. 65; and I thought they established the doctrine, not merely that there was an implied contract on the part of the lessor, that the house demised should be habitable, but an implied *condition*, that the lease should be void if it were not, and the tenant chose to quit. From the full discussion which those cases have now undergone, on the present argument, and that in the recent case of *Sutton v. Temple*, I feel satisfied they cannot be supported, if the reports of them are correct; and we all concur in opinion that they are not law, — an opinion strongly intimated, in the case of *Sutton v. Temple*, in which this Court decided, that there was no implied warranty of condition or fitness for a particular purpose on a lease of aftermath.

We are under no necessity of deciding in the present case, whether that of *Smith v. Marrable* be law or not. It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully in that of *Sutton v. Temple*; for it was the case of a demise of a ready-furnished house for a temporary residence at a watering-place. It was not a lease of real estate merely. But that case certainly cannot be supported on the ground on which I rested my judgment.

We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes — for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties

in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning. *Judgment for the plaintiff.*¹

GOTT AND FARQUHARSON v. GANDY

2 E. & B. 845. 1853.

COUNT: that plaintiffs were tenants to defendant of certain workshops, buildings and premises from year to year; and, during the tenancy, and whilst plaintiffs were in the occupation of the premises as such tenants to defendant, "a certain chimney, parcel of the said premises, without any neglect or default on the part of the plaintiffs, became and was in an insecure state and condition, and in danger of falling from want of substantial repairs in that behalf; of all which the plaintiffs then and long before the day hereinafter mentioned gave notice to the defendant. Yet the defendant, not regarding his duty in that behalf, did not nor would at the time of such notice, or in a reasonable time thereafter, or at any time," repair the chimney, which afterwards, and during the tenancy, on 27th December, 1852, fell, and damaged plaintiff's goods.

Demurrer. Joinder.

LORD CAMBELL,² C. J. I am of opinion that this declaration is bad in substance. Unless the declaration shews a state of things from which the law implies a duty to do those things, which the defendant has not done, the general allegation "the defendant, not regarding his duty" &c., goes for nothing. Now let us see what are the facts alleged. They are these: the defendant was landlord of premises which were let to the plaintiffs from year to year: during the tenancy the premises were in a dangerous state for want of substantial repairs: the defendant had notice from the plaintiffs, and was requested to repair them, and did not do so. Whence does the legal duty to repair these premises on request arise? There is no allegation of any contract to do substantial repairs. It lies therefore on the counsel of the plaintiffs, who are actors, to establish, on authority or on principle, that this obligation results from the relation of landlord and tenant. Mr. Russell can produce no

¹ *Roehrs v. Timmons*, 28 Ind. App. 578; *Rowe v. Hunking*, 135 Mass. 380; *Daly v. Wise*, 132 N. Y. 306; *Wood v. Carson*, 257 Pa. 522; *St. George Mansions v. Hetherington*, 42 Ont. L. Rep. 10, 4 A. L. R. 1453 note, accord. Compare *Gately v. Campbell*, 124 Cal. 520; *Pratt v. Grafton Electric Co.*, 182 Mass. 180; *Griffin v. Freeborn*, 181 Mo. App. 203; *Clark v. Sharpe*, 76 N. H. 446; *Keates v. Cadogan*, 10 C. B. 591; *Stanton v. Southwick*, [1920] 2 K. B. 642; Stat. 9 Edw. 7, c. 44, §§ 14, 15; 21 Col. L. Rev. 261. *Contra*, Louisiana Civil Code, §§ 2692-2695.

² The concurring opinions of COLERIDGE and ERLE, JJ., are omitted.

authority in his favour, not even a dictum. And I have heard no legal principle from which it would follow that the landlord was bound to repair the premises. It is clear to my mind that, though, in the absence of an express contract, a tenant from year to year is not bound to do substantial repairs, yet, in the absence of an express contract, he has no right to compel his landlord to do them.

*Judgment for defendant.*¹

INGALLS AND ANOTHER v. HOBBS

156 Mass. 348. 1892.

CONTRACT, to recover five hundred dollars for use and occupation, during the summer of 1890, of a house in Swampscott. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed statement of evidence.

KNOWLTON, J. This is an action to recover five hundred dollars for the use and occupation of a furnished dwelling-house at Swampscott, during the summer of 1890. It was submitted to the Superior Court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles, which were apparently in good condition; and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up and declined to occupy it.

The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs; if, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs, in the sum of five hundred dollars (\$500), with interest from date of writ, and costs." Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated

¹ *Little Rock Ice Co. v. Consumers Ice Co.*, 114 Ark. 532; *Mills v. Swanton*, 222 Mass. 557; *Conahan v. Fisher*, 233 Mass. 234; *Petz v. Voigt Brewing Co.*, 116 Mich. 418; *Rheims v. Dolley*, 93 Misc. (N. Y.) 500; *Smithfield Co. v. Coley-Bardin*, 156 N. C. 255, *accord*. Compare *Doyle v. Union Pac. Ry. Co.*, 147 U. S. 413; *Valin v. Jewell*, 88 Conn. 151; *Meserole v. Hoyt*, 161 N. Y. 59; *May v. Gillis*, 169 N. Y. 330; *Floyd-Jones v. Schaan*, 129 App. Div. (N. Y.) 82; *Horton v. Early*, 39 Okl. 99; *Auer v. Vahl*, 129 Wis. 635.

Contra, Louisiana, Civil Code. §§ 2692-2695.

by the Superior Court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record," which can be considered on an appeal in a case of this kind, is the question whether the judgment is warranted by the evidence. Pub. Sts. c. 152, § 10. *Charlton v. Donnell*, 100 Mass. 229. *Fitzsimmons v. Carroll*, 128 Mass. 401. *Old Colony Railroad v. Wilder*, 137 Mass. 536. *Mayhew v. Durfee*, 138 Mass. 584. *Hecht v. Batcheller*, 147 Mass. 335. *Rand v. Hanson*, 154 Mass. 87.

The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiffs that it was in a proper condition for immediate use as a dwelling-house. It is well settled, both in this Commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. *Dutton v. Gerrish*, 9 Cush. 89. *Foster v. Peyser*, 9 Cush. 242. *Stevens v. Pierce*, 151 Mass. 207. *Sutton v. Temple*, 12 M. & W. 52. *Hart v. Windsor*, 12 M. & W. 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it, for a term however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room or a furnished house for a few days or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses, in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house, let for a short time, is in proper condition for immediate occupation as a dwelling. *Smith v. Marrable*, 11 M. & W. 5. *Wilson v.*

Finch Hatton, 2 Ex. D. 336. *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507. *Sutton v. Temple*, *ubi supra*. *Hart v. Windsor*, *ubi supra*. *Bird v. Lord Greville*, 1 C. & E. 317. *Charsley v. Jones*, 53 J. P. 280.

In *Dutton v. Gerrish*, 9 Cush. 89, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards v. McLean*, 122 N. Y. 302, *Smith v. Marrable* and *Wilson v. Finch Hatton*, cited above, are referred to with approval, although held inapplicable to the question then before the court. See *Cleves v. Willoughby*, 7 Hill, (N. Y.) 83; *Franklin v. Brown*, 118 N. Y. 110.

We are of opinion that in a lease of a completely furnished dwelling-house for a single season, at a summer watering-place, there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

*Judgment affirmed.*¹

MOORE v. TOWNSHEND

33 N. J. L. 284. 1869.

THIS was an action on the case in the nature of waste, to recover damages for permissive waste, tried at the Cumberland Circuit. The plaintiff, on the 5th of November, 1853, by a lease, under seal, demised to the defendant the premises known as The Eagle Glass Works, in the county of Cumberland, together with one hundred and fifty moulds, and all the tools of every description connected

¹ *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Hatton*, 2 Ex. Div. 336, *accord*.

Contra, *Fisher v. Lighthall*, 4 Mackey (D. C.) 82; *Murray v. Albertson*, 50 N. J. L. 167. And see *Edwards v. McLean*, 122 N. Y. 302.

Compare *Sarson v. Roberts*, [1895] 2 Q. B. 395; 4 A. L. R. 1456, 1475 note.

"The first question which arises is whether any warranty is implied by law that when a person takes furnished rooms the proposed tenant is fit to occupy them—in other words, that he is not suffering from an infectious disease. It is admitted that there is no case in the books to support the proposition that there is any such warranty. No doubt when persons let rooms a warranty is implied that the premises are fit for immediate occupation; that is the result of the decisions in *Smith v. Marrable*, 11 M. & W. 5, and *Wilson v. Finch Hatton*, 2 Ex. D. 336. But that is a long way from the proposition suggested for our acceptance, and I am clearly of opinion that there is no foundation in law for the argument that a warranty ought to be implied from the intending tenant. If such a warranty is to be imposed, it must be imposed by statute. I agree with the view taken by Darling, J., and think that this appeal must be dismissed. [His Lordship then dealt with the evidence as to concealment and misrepresentation, and came to the conclusion that there was no evidence of concealment against Miss Miller, nor of misrepresentation against Dr. Harboard.]"—*Per* SWINFEN EADY, L. J., in *Humphreys v. Miller*, [1917] 2 K. B. 122, 124.

with the glass manufactory business at that manufactory; to hold for the term of two years and eight months, at a yearly rent of one thousand dollars. The lease contained a covenant, by the tenant, for the re-delivery of the moulds and tools, to the lessor, at the expiration of the term, in as good condition as they were in at the time of the demise, reasonable wear and tear and fire excepted. It also contained the following clause: "It being understood and agreed between the said parties that said Moore has the privilege of laying out one hundred dollars per year in repairs on said property, and deducting the same from the rent." There was no other covenant in the lease on the subject of repairs. It was shown, at the trial, that twenty-one dollars and fifty cents had been expended in repairs during the continuance of the lease, of which sum six dollars and ninety-five cents had been deducted from the rent, the balance of which had been paid.

The jury found a verdict for the plaintiff, and assessed his damages at five hundred and fifty dollars.

A rule to show cause why a new trial should not be granted, was allowed; and the following reasons were assigned for setting aside the verdict. 1. Because an action on the case will not lie against a tenant for years for permissive waste. 2. Because the lease between the parties measures and limits the liability of the tenant, in the matter of repairs.

DEPUE, J. The action on the case, in the nature of waste, has almost entirely superseded the common law action of waste, as well for permissive as for voluntary waste, as furnishing a more easy and expeditious remedy than a writ of waste. It is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted.

At common law, waste lay against a tenant in dower, tenant by the curtesy and guardian in chivalry, but not against lessees for life or years. 2 *Inst.* 299, 305; *Co. Litt.* 54. The reason of this diversity was, that the estates and interests of the former were created by the law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner who might have provided in his demise against the doing of waste by his lessee, and if he did not, it was his negligence and default. 2 *Inst.* 299; *Doct. & Stu. ch.* 1, p. 102. This doctrine was found extremely inconvenient as tenants took advantage of the ignorance of their landlords, and committed acts of waste with impunity. To remedy this inconvenience the statute of Marlbridge (52 *Hen.* 3, *ch.* 23) was passed. But as the recompense given by this statute was frequently inadequate to the loss sustained, the statute of Gloucester (6 *Edw.* 1, *ch.* 5,) increased the punishment by enacting that the place wasted should be recovered, together with treble damages. 1 *Cruise Dig.* 119, § 25, 26; *Sackett v. Sackett*, 8 *Pick.*, p. 313, per Parker, C. J. The statute of Marl-

bridge is in the following words: "Also fermors, during their terms, shall not make, waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously." 2 *Inst.* 145. The word fermer (*firmarii*) in this statute comprehended all such as held by lease for life or lives, or for years, by deed or without deed. 2 *Inst.* 145, *note* 1, and also devisees for life or years. 2 *Roll. Abr.* 826, *l.* 35. By the statute of Gloucester, "it is provided, also, that a man, from henceforth, shall have a writ of waste, in the Chancery, against him that holdeth by law of England or otherwise, for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste, shall leese the thing that he hath wasted, and, moreover, shall recompence thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the great charter." 2 *Inst.* 299. At the common law, a tenant at will was punishable for voluntary waste, but not for permissive waste. *Countess of Salop v. Crompton*, *Cro. Eliz.* 777, 784. The Countess of Shrewsbury's case, 5 *Rep.* 14; *Harnett and Wife v. Maitland*, 16 *M. & W.* 258. Tenants in dower, by the curtesy, for life or lives, and for years, were included in the statute of Gloucester. Tenants at will were always considered as omitted from the statute of Marlbridge as well as from the statute of Gloucester, and, therefore, continued to be dispunishable for mere permissive waste, and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste, was the uncertain nature of their tenure which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the statute of Gloucester, is attributable to the fact that the owner of the inheritance might at any time, by entry, determine the estate of the tenant, and thus protect the inheritance from spoil or destruction.

The language of the statute of Marlbridge is, "shall not make (*non facient*) waste," and in the statute of Gloucester, in speaking of guardians, the words used are, "he which did waste" (*que avera fait waste*). The settled construction of these statutes in the English law until a comparatively recent period was, that they included permissive wastes as well as voluntary waste. In a note in exposition of the statute of Marlbridge, Lord Coke, in commenting on the words "*non facient*," says: "To do or make waste, in legal understanding in this place, includes as well permissive waste, which is waste by reason of omission or not doing as for want of reparation, as waste by reason of commission, as to cut down timber, trees, or prostrate houses, or the like; and the same word hath the statute

of Gloucester, *ch. 5, que aver fait waste*, and yet is understood as well as of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste." 2 *Inst.* 145; 7 *Bac. Abr.* 250; 3 *Bl. Com.* 225; 2 *Saund.* 252; 4 *Kent* 76. So under the prohibition to do waste, the tenant is held to be bounden for the waste of a stranger, though he assented not to the doing of waste. *Doct. & Stu.*, *ch. 4*, *p. 113*; 2 *Inst.* 303; *Fay v. Brewer*, 3 *Pick.* 203; 1 *Washburn R. Prop.* 116. It is common learning that every lessee of land, whether for *life* or *years*, is liable in an action of waste to his lessor, for all waste done on the land in an action of waste to his lessor, for all waste done on the land in lease by whomsoever it may be committed, per Heath, J., in *Attersoll v. Stevens*, 1 *Taunt.* 198; with the exception of the acts of God, public enemies, and the acts of the lessor himself. *White v. Wagner*, 4 *Harr. & Johns.* 373; 4 *Kent* 77; *Heydon and Smith's Case*, 13 *Coke* 69. The instances in the earlier reports in which lessees for life or years, were held liable for permissive waste, which consisted in injuries resulting from acts of negligence or omission, are quite frequent; and their liability is grounded, not on the covenants or agreements in the instruments of demise, but on the statute, which subjected them to the action of waste. *Griffith's Case*, *Moore* 69, *No. 187*; *Ib.* 62, *No. 173*; *Ib.* 73, *No. 200*; *Keilway* 206; *Darcy v. Askwith*, *Hobart* 234; *Glover v. Pipe*, *Owen* 92; 3 *Dyer* 281; 2 *Roll. Abr.* 816 l, 40; 22 *Vin. Abr. Waste "c" and "d," p. 436-440, 443*; *Co. Litt.* 52 a, 53 b; 5 *Com. Dig. Waste, d 2, d 4*; *Bissett on Estates*, 299, 300. So uniformly had the courts determined that lessees for life or years, had committed waste by the application of the common law rules, with respect to waste, whether of omission or commission, that the learned commentator on English law says, "that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste." 2 *Bl. Com.* 283.

This construction of the statutes of Marlbridge and Gloucester continued to be received without dissent until the decision of the case of *Gibson v. Wells*, 4 *B. & P.* 290, in the year 1805 which was followed by the case of *Herne v. Bembow*, 4 *Taunt.* 764 (1813). These cases it is insisted have settled the construction against the liability of a tenant for years for permissive waste. *Gibson v. Wells*, is not an authority for this position. The tenant against whom the action there was brought was a tenant at will, who is not included within the statutes, and who, at common law, was punishable for voluntary, but not for permissive waste. In *Herne v. Bembow*, it does not clearly appear that the lease was for a term. It is certain that the opinion of the Court, proceeded upon principles applicable to tenants at will. As the case is reported in *Taunton*, it appears to have been decided, without argument or consideration. The opinion is a *per curiam*

opinion, and the only case cited is the *Countess of Shrewsbury's Case*, 5 Co. 14, which was a case of a tenancy at will.

The only subsequent case which sustains these cases is *Torriano v. Young*, 6 C. & P. 8; a case at *nisi prius*. In other cases where *Herne v. Bembow* was cited, the English Courts show no disposition to follow it. In *Jones v. Hill*, 7 Taunt. 392, Gibbs, C. J., expressly guards himself against being supposed to concur in the position that an action will not lie against a lessee for years for permissive waste. In *Martin v. Gilham*, 7 A. & E. 540, and in *Beale v. Sanders*, 3 Bing. N. C. 850, a decision of that question is avoided; and in *Harnett v. Maitland*, 16 M. & W. 256, 261, Parke, B., on *Gibson v. Wells*, *Herne v. Bembow*, and *Torriano v. Young* being cited, intimates an opinion against those cases as necessarily involving the result that a tenant for life is also dispunishable for permissive waste. Text writers of acknowledged authority have not recognized these cases as settling the law against the older cases and the opinions of Coke and Blackstone, but have regarded them as merely throwing a doubt upon a principle that had previously been set at rest. 2 Saund. 252 b, note i; Arch. L. & T. 196, 7; Smith on L. & T. 196; Comyn on L. & T. 495; and note e; 2 Bouvier's Law Dict. 645, Waste, § 14; 1 Washburn on R. Prop. 124, and note 1. By other legal writers they are doubted or condemned as unsound in principle. Roscoe on Real Actions 385; Ferrard on Fixtures 278, 281, note; 1 Evans' Statutes 193, note; Broom on Parties 257; 4 Kent 76, 79; Elmes on Dilapidations 257.

Independent of authority, the true construction of the statute of Gloucester, leads to the conclusion that tenant for life or years, was made liable for permissive as well as voluntary waste. Before either this act or the statute of Marlbridge was passed, waste was recognized in the law, as an injury to the inheritance, resulting either from acts of commission or of omission. Neither of these statutes created new kinds of waste, but gave a new remedy for old wastes, leaving what was waste, and what not, to be determined by the common law. 2 Inst. 300; and by the statute of Gloucester the writ of waste was suable out of Chancery as well against lessee for life or years, as against tenant by the curtesy, or in dower, putting the former, as to the newly created remedy, on the same footing as the latter. "It hath been used as an ancient maxim in the law, that tenant by the curtesy, and the tenant in dower, should take the land with this charge, that is to say, that they should do no waste themselves, nor suffer none to be done; and when an action of waste was given after, against a tenant for term of life, then he was taken to be in the same case, as to the point of waste as tenant by the curtesy, and tenant in dower was, that is to say, that he should do no waste, nor suffer none to be done." Doct. & Stu., ch. 4, p. 113. No distinction can be made between lessee for life and lessee for years. Both are mentioned in the statute conjointly; and each derives his interest in the premises from the act of the owner of the inheritance.

The second section of the act for the prevention of waste, which is in force in this state (*Nix. Dig.*, 4th ed., 1022,) provides that no tenant for life or years, or for any other term, shall during the term *make or suffer* any waste, sale or destruction of houses, gardens, orchards, lands, or woods, or anything belonging to the tenements demised, without special license in writing, making mention that he may do it. The third section is in substance the same as the statute of Gloucester. The act was passed in 1795. The use of the words "*make or suffer*," in the second section, which are equivalent to Coke's interpretation of *facient* in the statute of Marlbridge, manifests an intent to adopt as the law of this state, the doctrine of the English courts, as to the liability of tenants for life or years for permissive waste, which was universally received at the time of the passage of the act.

The second reason assigned involves the effect of the lease in this action.

Premising that the act or omission, to constitute waste must be either an invasion of the lord's property, or at least be some act or neglect which tends, materially, to deteriorate the tenement, or to destroy the evidence of its identity; (*Burton's Comp. R. Prop.* 411; *Doe ex dem. Grubb v. Earl of Burlington*, 5 B. & Ad. 507; 2 Saund. 259 a, note o; 1 Pyncheon v. Stearns, 11 Met. 304; 1 Washburn R. Prop. 108;) and that the action is founded partly upon the common law and partly upon the statute, and does not depend for its support on any covenants of the tenant; (22 Viner Abr. 457, Waste M. 4; 3 Bl. Com. 227; *Kinlyside v. Thornton*, 2 W. Black 1111; *Marker v. Kenrick*, 13 C. B. 188;) it is obvious that we must resort to the statute for the conditions on which the tenant is excusable for the waste done.

There is a class of cases in which tenants have been held not to be liable for waste resulting from non-repair where the lessor has entered into a covenant to make the repairs for the want of which the injury has happened. These cases go upon the ground that the injury was caused by the lessor's own default, on which he can base no right to recover. There is no such covenant in the lease now under consideration.

The statute forbids waste by the tenant "without special license, in writing, making mention that he may do it." The consent of the landlord by parol will not be sufficient authority. *McGregor v. Brown*, 6 Seld. 114. The words usually employed for this purpose are "without impeachment of waste," but any words of equivalent import will be sufficient, provided they amount to a license to do the acts. The defendant, to bring himself within the statute, relies on that part of the lease which relates to the re-delivery of the personal property leased, in connection with the stipulation giving the defendant the privilege of expending a portion of the rent in each year for repairs. The covenant as to the personal property is entirely

distinct from the obligations of the tenant, with respect to the real estate. The privilege of expending a portion of the rent reserved in repairs, is not a license to the tenant to omit a duty put upon him by the statute, growing out of the relations between the parties. To construe a privilege given by the landlord to expend his money in the reparation of the demised premises, as a license to the tenant to omit his duty, to the spoil or destruction of the inheritance, would be an entire subversion of the obvious intent of the landlord. If it falls short of a license for the act complained of, it does qualify or abridge the obligations of the tenant which exist independent of the provisions of the lease.

It was further insisted that if any action lies, it should be an action *ex contractu*, and not in *tort*. As already observed the gravamen of the action is the breach of a statutory duty. An action on the case founded in *tort* will lie for the breach of a duty though it be such as that the law will imply a promise on which an action *ex contractu* may be maintained. *Brunnell v. Lynch*, 5 B. & C. 589. To the same effect are the cases of *Kinlyside v. Thornton* and *Marker v. Kenrick*; already cited, in which it was held that an action on the case in the nature of waste, will lie, although the act complained of might also be the subject of an action for the breach of an express covenant.

Rule discharged.

BEASLEY, CHIEF JUSTICE, and Justice DALRIMPLE, concurred.¹

THE COUNTESS OF SHREWSBURY'S CASE

5 Co. 13a. 1600.

THE Countess of Shrewsbury brought an action on the case against Richard Crompton a lawyer of the Temple, and declared, that she leased to him a house at will, & *quod ille tam negligentè & improvidè custodivit ignem suum, quod domus illa combusta fuit*: to which the defendant pleaded not guilty, and was found guilty, &c. And it was adjudged that for this permissive waste no action lay, against the opinion of Brook in the abridgement of the case of 48 E. 3. 25. Wast. 52. And the reason of the judgment was, because at the common law no remedy lay for waste, either voluntary or permissive against lessee for life or years, because the lessee had interest in

¹ *Suydam v. Jackson* 54 N. Y. 450; *Harnett v. Maitland*, 16 M. & W. 257; *Davies v. Davies*, 38 Ch. D. 499, *accord*.

In the following cases the court said that a tenant for life is liable for permissive waste. *Miller v. Shields*, 55 Ind. 71, 77; *Stevens v. Rose*, 69 Mich. 259; *Wilson v. Edmonds*, 24 N. H. 517, 545; *Schulting v. Schulting*, 41 N. J. Eq. 130, 132; *Sperrill v. Connor*, 107 N. C. 630, 636; *Harvey v. Harvey*, 41 Vt. 373. *Contra*, *In re Cartwright*, 41 Ch. D. 532.

A tenant from year to year is liable for permissive waste. *Newbold v. Brown*, 44 N. J. L. 266. See *Long v. Fitzimmons*, 1 W. & S. (Pa.) 530; *Wedd v. Porter*, [1916] 2 K. B. 91.

the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So and for the same reason, a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, fol. (15) 152. If lessee at will commits voluntary waste, *scil.* in abatement of the houses, or in cutting of the woods, there a general action of trespass lies against him. For as it is said in 2 and 3 Phil. & Mar. Dyer 122. b. when tenant at will takes upon him to do such things which none can do but the owner of the land, these amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass without any entry: and there 15 E. 4. 20. b. is cited, that if a bailee of goods as of a horse, &c. kill them, the bailor shall have a general action of trespass, for by the killing the privity was determined. But it was agreed that in some cases, when there is a confidence reposed in the party, the action upon the case will lie for negligence, although the defendant comes to the possession by the act of the plaintiff. As 12 E. 4. 13. a. b. where a man delivers a horse to another to keep safe, the defendant *equum illum tam negligenter custodivit, quod ob defectum bonæ custodiæ interiit*; the action on the case lies for this breach of the trust. So 2 H. 7. 11. if my shepherd, whom I trust with my sheep, and by his negligence they be drowned, or otherwise perish, an action upon the case lies: but in the case at bar it was a lease at will made to the defendant, and no confidence reposed in him; wherefore it was awarded, that the plaintiff take nothing by her bill.¹

EARLE v. ARBOGAST AND BASTIAN

180 Pa. 409. 1897.

At the trial it appeared that the premises in question had been leased by the plaintiff to the defendants by parol for one year, with no agreement to repair or to deliver the premises in good order and condition at the end of the term. The property had been used by the lessor as a soap factory, and this use was continued by the defendants. The only new appliance which the defendants used was a rendering tank which exploded and caused the injuries for which suit was brought. It was claimed by the plaintiff that the explosion was caused by the vent pipe of the tank becoming clogged. It was also averred by him that the tank was not strong enough to withstand the pressure of steam that was put upon it.²

OPINION BY MR. JUSTICE FELL, March 22, 1897:

Generally in the absence of an express covenant on the subject the

¹ *Lothrop v. Thayer*, 138 Mass. 466, accord. See *Means v. Cotton*, 225 Mass. 313, 319.

² The report of the charge of the lower court is omitted.

law implies a covenant on the part of the lessee so to treat the demised premises that they may revert to the lessor unimpaired except by usual wear and tear, and uninjured by any wilful or negligent act of the lessee. The implied covenant does not however extend to the loss of buildings by fire, flood or tempest, or enemies, which it was not in the power of the lessee to prevent, and there is no implied covenant that the lessee shall restore buildings which have been destroyed by accident without fault on his part: Jackson and Gross' Landlord and Tenant, in Pennsylvania, sec. 964, 965; Taylor's Landlord and Tenant, sec. 343; Cooley on Torts, p. 335; Long v. Fitzimmons, 1 W. & S. 530; United States v. Bostwick, 94 U. S. 53.

Tenants by the curtesy and in dower were responsible at common law, and tenants for life and for years whose estates were created by the acts of the parties, were responsible under statute as for permissive waste until relieved by the statute of 6 Anne, chap. 31, where the property was destroyed by unavoidable accident, not the act of God or the public enemy. The statute of 6 Anne, chap. 31, which relieved the tenant from liability for the consequences of accidental fires has never been in force in this state, and it has been formally adopted by few if any of the other states, except New Jersey. Chancellor Kent, 4 Kent's Com. 82 says: "Perhaps the universal silence of our courts upon the subject of any such responsibility of the tenant for accidental fires is presumptive evidence that the doctrine of permissive waste has never been introduced and carried to that extent in the common law jurisprudence of the United States." In U. S. v. Bostwick, supra, it was held that the implied covenant of the tenant is not to repair generally, but so to use the property as to make repairs unnecessary as far as possible, and that it is a covenant against voluntary waste only. It is said in the opinion by WAITE, C. J.: "It has never been so construed as to make a tenant answerable for accidental damages nor to bind him to rebuild if the buildings are burned down or otherwise destroyed by accident." The statement in the opinion in Long v. Fitzimmons, supra, that a tenant, where there is no covenant to that effect, is not bound to restore buildings that have been burned down or become ruinous by other accident without default on his part may be a dictum only, but it is in harmony with the trend of decisions of the courts of other states and of the federal courts, and it has been accepted and acted upon by the courts of this state, and it is a correct statement of the law.

There could be no recovery without proof of the defendants' negligence, and the burden of proof rested upon the plaintiff. The lease was in parol, for one year, with no agreement to repair or to deliver the premises in good order and condition at the end of the term. No new or different use was made of the building by the tenants. It was used by them for the purpose for which it had been leased, and for which it had been fitted with machinery and used by the lessor. The

only new appliance used was the rendering tank which exploded. In the use of the property leased the defendants were under an implied duty not to negligently injure it. The standard of their duty was reasonable care. The mere fact of the explosion did not throw upon them the burden of proving that they were not negligent. The burden of proof was with the plaintiff throughout the trial. He was not bound in the first instance to prove more than enough to raise a presumption of negligence on the part of the defendants. Proof of the explosion and of the attendant circumstances might have furnished sufficient ground for a reasonable inference of negligence to have made out a *prima facie* case, but he could not rest his case upon a bare presumption based only upon the fact that the explosion occurred. The answers to the third, fourth and fifth points affirmed these propositions and are free from error.

The assignments which complain of the charge cannot be sustained. An inadequate presentation of the case, when the omission to charge leaves the jury without direction on important questions involved, or plainly tends to mislead them, is ground for reversal. In this case the charge was clear and full. The omission now complained of was in not calling the attention of the jury to some features of the case which counsel at the time did not deem of sufficient importance to mention, and which may have been discovered only by a critical analysis of the charge made since the trial.

The judgment is affirmed.¹

WHITE v. WAGNER

4 Har. & J. (Md.) 373. 1818.

THIS was an action of trespass on the case, in the nature of waste.²

1. At the trial it was admitted that the defendant was tenant of the premises in question, as a dwelling-house under the plaintiff, for a year, at the rent of \$350, and that no covenants or agreement were entered into by the parties relative to repairs of the premises, or other matters relating thereto, other than such as are implied by law, except merely the agreement to let the premises by the plaintiff to the defendant for a year, and by the defendant to pay the said rent. That the defendant entered into possession sometime in the month of May, 1812, and continued therein until the 27th of June of the same year, when a large armed multitude of unknown persons, being residents of the city of *Baltimore*, or of this state, assembled

¹ Tenant's liability for accidental fires not due to his negligence. *United States v. Bostwick*, 94 U. S. 53; *Wainscott v. Silvers*, 13 Ind. 497; *Levey v. Dyess*, 51 Miss. 501; *Sampson v. Grogan*, 21 R. I. 174; *Maggort v. Hansbarger*, 8 Leigh (Va.) 532. See *Machen v. Hooper*, 73 Md. 342.

² The pleadings which follow are omitted.

and combined themselves together in the said city for the purpose of pulling down the said house, and compelling the defendant to desist from the distribution of a newspaper called *The Federal Republican*, and to drive the defendant from the said city. That the mayor of the city, the judges of the court of oyer and terminer and gaol delivery for *Baltimore* county, and other civil officers of the said city and county, being informed of this combination and assemblage of an armed multitude, and the purposes for which they were so assembled, did, by all such ways and means as they deemed best calculated, from the powers they possessed, endeavour to prevent and hinder the said multitude from perpetrating their unlawful and outrageous purposes as aforesaid; but in spite of all the efforts of the said civil officers, and by a power wholly uncontrollable and irresistible by the said officers, or by the defendant, the said armed multitude did compel the defendant, and his family, for the safety of their lives, to fly from and abandon said house and premises, and from the said city, and did ruin, spoil, and destroy said house, in the manner as stated in the declaration. The plaintiff then offered evidence to prove, that after the defendant took possession of the said house, he used it for the purpose of receiving therein a newspaper called *The Federal Republican*, which was printed in *George Town*, in the District of *Columbia*, of which the defendant was an editor and proprietor, and from thence to distribute the same to the subscribers to the said paper, who resided in the city of *Baltimore*; and having reason to believe that the said house would be attacked by a lawless armed and unknown multitude, if the said paper was received and distributed therefrom, he collected, in a peaceable and lawful manner, a number of armed men for the purpose of defending the said house against any attack which might be made thereon by the said unknown multitude as aforesaid; and that it was after the introduction of the said armed men to defend the house, and the commencement of the distribution aforesaid therefrom, that the said armed multitude, as herein before stated, attacked, ruined and spoiled the house. To the admission of which said evidence, under the present declaration, the defendant objected. But the Court, [*Bland* and *Hanson*, A. J.] overruled the objection, and permitted the whole of said testimony to be given to the jury. The defendant excepted.

2. The defendant then moved the court to direct the jury, that if they believed the facts so admitted and given in evidence, that then the plaintiff was not entitled to recover. Which opinion and direction the Court [*Dorsey*, Ch. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against her, she appealed to this court.

JOHNSON, J. The action in this case was brought in *Baltimore* county court, to recover damages for a *dwelling-house* on *Charles* street, in the city of *Baltimore*, which was materially injured during the time it was let by the plaintiff to the defendant.

The facts as they present themselves on the bill of exceptions are: (He here stated the case.)

The declaration contains two counts, the one an action on the case in the nature of waste, the other on an implied undertaking to restore the property in good tenantable repair, alleging as the breach the destruction of the property by the defendant.

Actions of the present nature have been seldom if ever brought in this state; indeed a transaction similar to the present never before, and it is greatly to be deplored ever did, and it is hoped never will arise again, in which *private property* has been by force destroyed against the exertions of the civil authority, collected on the spur of the occasion for its preservation. But as the property has been destroyed, as between the landlord and tenant, the question is who must bear the burden of the loss?

In forming an opinion on the present subject it is not necessary to trace the law of waste, as it existed at common law, or as changed by the statutes of *Marlbridge* and of *Gloucester*; it is sufficient to observe, that those statutes make a *lessee for years* liable to the action of waste, in which when determined against the tenant, he forfeited the place wasted, and was compelled to pay treble damages.

Waste, *vastum*, is a spoil or destruction in houses, &c. to the disherison of him that hath the remainder or reversion in fee simple or fee tail. The removing wainscot floors, or other things once fixed to the freehold, is waste. *Co. Litt.* 53. 4 *Rep.* 64. 2. *Blk.* 281.

Waste is *voluntary*, a crime of commission, as *pulling* down a house; or *permissive*, which is matter of *omission* only, as by suffering it to fall for necessary repairs.

If the property in question had been destroyed, as set forth in the plaintiff's claim, by the *defendant himself*, or by others at *his instance*, it is clear he made himself liable to an action of waste; wherein not only would have been recovered the house let, (supposing the lease not expired,) but treble damages. The injury done to the property would have assumed the denomination of *wilful waste*. But as the destruction was not, in the common acceptation of the term, made by himself, or by others at his instance, is he liable?

It is not novel in the law to make persons, morally innocent, responsible for the acts of those over whom they had no control. In various instances, where the property of the owner is placed in the care of another, such person is liable to the owner for its loss, or for injuries done to it, which the possessor could not restrain.

The common carrier, the inn-keeper, the sheriff, and others not thought material to enumerate, are responsible for losses which they could not prevent. They stand liable to the owner for all losses, whether sustained by highway robbers, or others, no matter how *incontrollable* and *irresistible* may be the force with which they are assailed. The act of God, and of the public enemies, will only free them from the demand, when the loss proceeded from such act or such enemies. and then only when they are free from every exception.

If the law was otherwise, by conniving with the robbers and thieves, no property could be safe in their custody; it would scarcely ever be in the owner's power to ascertain whether the loss was the result of concert, or of force — whether the alleged attack might or might not have been resisted. To free them from all temptation to swerve from their duty, and to secure an effectual remedy to those who intrust them with their property, all excuses of the kind spoken of are precluded; for it is better that, occasionally, the loss should fall on an innocent person, *than* to relax, and in effect, to defeat all liability.

At the common law all such as were liable to the action of waste, no matter what might be their situation, no matter what might be the power to repel the waste from being done, if it was committed, they were bound to respond. The infant age of the tenant would not free him from the responsibility. Under the statutes of *Marlbridge* and *Gloucester*, the same liabilities are cast on the tenant for years.

The defendant, in the case before the court, comes within the purview of those statutes, and must therefore be responsible, unless the overwhelming force, by which the injury was done, exonerates him.

As the property of the landlord is placed in the tenant's possession, who has the legal power to prevent all waste from being done to it, and to recover for it, when committed, as in most instances it would be impossible for the landlord to ascertain in time, or come at the wrongdoer, it appears to have been the policy of the law, to cast the liability on the part of the tenant for all waste committed on the property, except when caused by the act of God, or of the king's enemies. But let it, for argument's sake, be conceded, that if the defendant had continued to use the house for the purpose it was let to him, and that whilst so used, the lawless multitude attacked and destroyed it, that he would not have been liable, *a point not necessary to be determined in this case*; yet as *he* did of his own authority, without the consent of the plaintiff, divert the house to a wholly different and much more dangerous purpose, well aware of the risk which the property would thereby have to encounter, on principles of law and justice, as between him and the plaintiff, he becomes responsible for the consequences.

If the common carrier, who puts to sea during a storm, or on its approaching, cannot exonerate himself from the loss the storm may produce, which he attempted to buffet, so it appears equally just that a *tenant*, who applies the property to a different purpose than it was let to him, aware of the great increase of risk, in consequence of such diversion, *must bear*, and not *cast* the responsibility on the landlord. My opinion, therefore, is, that on principles of law and justice, the merits of the case are with the plaintiff.

The action of waste appears to have given way to, or been superseded by, the action on the case in *nature of waste*, which is the first count in the present declaration. Two grounds have been relied on against the first count:

1st. That the evidence does not support the count; and

2d. That if the defendant was liable, yet as the *waste was permissive*, and not *voluntary*, an action on the case, in the nature of waste, will not lie.

The declaration, it is true, states the destruction of the property to have been made by the defendant, and by those taken into the house by him.

In common parlance a person cannot be said to have done an act which was done by another; nor can he be charged with causing a destruction to take place when every exertion in his power was used to prevent it. But in the legal acceptance of the charge, he who does certain acts, by others, is said to have done them himself. *Qui facit per alium facit per se*. If the tenant is *generally* responsible for *all* waste committed by strangers, no matter how overwhelming the power, how much more strong is the case before the court, when the property in question was applied to a different object than that for which it was let; the defendant having reason to believe that in consequence of such application "the house would be attacked by a lawless armed and unknown multitude" — As, between the plaintiff and defendant, the acts of the multitude produced by the acts of the defendant and those in concert with him, must be imputable to the defendant himself, and of course the charge, as contained in the count, is correct.

The second objection to the count by the preceding reasoning is also removed; for, if the defendant is to be liable as of himself, for the waste committed by the lawless multitude, then it follows that the destruction to the property in question, comes strictly under the denomination of *voluntary* waste, for which, no doubt is entertained but that the present action is applicable. It would then appear that there is no need to form an opinion, whether the action on the case, in the nature of waste, will, or will not lie for permissive waste; but the inclination of my mind is, that that action will be sustained as well for the one as for the other description of waste. It is a form of action, long since introduced, to recover for such injuries; it is an equitable action, and ought not to be discountenanced; it confines the recovery to the real loss sustained; and I see no reason to say that it will not lie in *all cases*, and against *all* persons, who are at common law, or under the statutes of *Marlbridge* and *Gloucester*, made *liable to the action of waste*.

As the case is covered by the first count in the declaration, I deem it totally unnecessary to add whether the evidence sustains the second.

The opinion of the court below, as pronounced on the second bill of exceptions is erroneous, and the judgment obtained in consequence thereof is reversed.

MARTIN, J., dissented.

Judgment reversed, and procedendo awarded.

FAY v. BREWER

3 Pick. (Mass.) 203. 1825.

ACTION on the case in the nature of waste, for cutting down trees.¹

The defendant offered to prove that the trees were cut down by other persons, mere trespassers, without his consent or knowledge.

PER CURIAM. It is clear that a tenant for life is bound to see that trespassers do not injure the state, and for this purpose the law gives him an action of trespass. So that whether waste is committed by himself or by a stranger, he is alike answerable to the reversioner.²

CODMAN AND OTHERS v. AMERICAN PIANO CO.

229 Mass. 285. 1918.

CONTRACT by the trustees of the Municipal Real Estate Trust, a voluntary association, as the lessors under a lease in writing dated May 24, 1912, of certain real estate numbered 169 on Tremont Street in Boston against the lessee thereunder to recover \$266.67 with interest thereon, as being the amount of federal income taxes taxes paid by the plaintiffs upon the rent received by them as income from the leased premises and alleged to be payable by the defendant as lessee under the terms of the covenant to pay taxes, which is quoted in the opinion. Writ dated July 31, 1917.

In the Superior Court the case was submitted to *Brown, J.*, as a case stated by agreement. At the request of the parties the judge, without making any decision, reported the case for determination by this court upon the pleadings and the case stated.

CROSBY, J. Upon the case stated it appears that the defendant in 1912 entered into a written indenture of lease with Paul M. Hamlen and Miriam P. Loring as lessors whereby they demised certain premises to the defendant for a long time at a rental therein recited. The plaintiffs are trustees of a voluntary association which succeeded to the rights of the original lessors under the lease. The lease contains the following covenant: (b) "And the lessee further covenants and agrees with the lessors to pay punctually within fourteen (14) days from the times when they become due and payable all taxes and assessments whatsoever which may be payable for or in respect of

¹ The statement of facts and the opinion are abbreviated.

² *Parrott v. Barney*, Fed. Cas. 10773a; *Cargill v. Sewall*, 19 Me. 288, 291; *Wood v. Griffin*, 46 N. H. 230; *Dix v. Jacquay*, 94 N. Y. App. Div. 554; *Regan v. Luthy*, 16 Daly (N. Y.) 413; *Powell v. Dayton R. R. Co.*, 16 Oreg. 33, accord. Compare *Foot v. Dickinson*, 3 Met. (Mass.) 611; *Rogers v. Atlantic, G. & P. Co.*, 213 N. Y. 246; *Winfree v. Jones*, 104 Va. 39.

the leased premises during the term thereof, except assessments for betterments hereinafter arranged for."

Under the terms of the federal income tax enacted October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the association under § 2, paragraph G (a) was subject in each of the years 1914, 1915, and 1916 to a tax of one per cent upon its entire income arising or accruing from all sources during the preceding calendar year. In each of the years above referred to a tax at the rate of one per cent was duly assessed upon the association's entire net income, which assessments have been paid by the association in accordance with the terms of the act. The plaintiffs seek in this action to recover the amount of the taxes so paid upon the amount of the rent reserved in the lease and paid by the defendant to the association. The income tax act, under which the taxes were levied and paid, contains the following provisions:

"A. Subdivision 1. There shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income . . ."

"E. . .

"The provisions of this section relating to the deduction and payment of the tax at the source of income shall only apply to the normal tax hereinbefore imposed upon individuals."

"G. (a) The normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; . . ."

It is agreed that the plaintiffs are an "association" as that word is used in paragraph G (a), and that the defendant paid to the association the full rent in the amounts and at the times specified by the lease, and did not withhold the federal income tax of one per cent.

The question then is whether the defendant is liable to indemnify and pay to the plaintiffs the amount of the taxes upon the rents so paid by the plaintiffs to the federal government. It is the contention of the plaintiffs that the defendant is liable under the covenant in the lease above quoted, and that the case is governed by *Suter v. Jordan Marsh Co.* 225 Mass. 34, and by *Pollock v. Farmers' Loan & Trust Co.* 157 U. S. 429; *S. C.* 158 U. S. 601.

This contention requires us to consider what these cases actually

decided so far as they have any bearing upon the issue presented in the case at bar.

The case of *Suter v. Jordan Marsh Co.* decided that where the defendant was required to withhold and pay and did so withhold and pay to the United States, under the federal income tax law, paragraph E of § 2 above referred to, the "normal" income tax on certain rents reserved in a lease given by it to the plaintiffs, the defendant could not deduct the amount of such payment from the amount of the rent which it paid to the lessors. The lease in that case contained a covenant that the lessee should pay "all taxes and assessments whatsoever, except betterment taxes, which may be levied for or in respect of the said leased premises, or any part thereof, or upon or in respect of the rent payable hereunder by the Lessee howsoever and to whomsoever assessed." It is to be noted that the covenant required the lessee to pay the taxes not only for or in respect to the premises leased, but also "upon or in respect of the rent payable" under the lease. Accordingly it was said by this court that "by the terms of the lease, the defendant has obligated itself to pay 'all taxes and assessments . . . upon or in respect of the rent . . . howsoever and to whomsoever assessed.' The setting forth of the defence shows that it cannot prevail." In other words, the agreement of the parties as expressed in the lease is to govern and control their respective rights in view of the language employed.

In the case at bar the covenant in the lease contains no agreement that the lessee will pay taxes assessed upon or in respect of rent payable under the lease, and so is clearly distinguishable from the case of *Suter v. Jordan Marsh Co. supra*.

The case of *Pollock v. Farmers' Loan & Trust Co.* 157 U. S. 429, dealt with the federal income tax law of 1894, and decided that a tax levied upon rents or income received from real estate was a direct tax and was unconstitutional because not levied in accordance with the constitutional rule of apportionment. In coming to the conclusion that a tax upon the rents or the income from real estate was a direct tax, the court said at page 581, "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income." Accordingly it was held that a tax upon such rents was as much a direct tax as a tax upon the land itself.

When the case was heard in re-argument, 158 U. S. 601, the previous decision on this point was reaffirmed in the following language at page 637: "We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes."

The decision in the *Pollock* case that a tax on rents of real estate is a direct tax, and that therefore the federal income law which provided for a tax upon such rents was unconstitutional, related only

to the constitutional power of Congress to tax incomes. The court did not consider or decide that a tax on rent was a tax for or in respect to the premises from which the rent was derived. That is a wholly different question.

On rehearing of the Pollock case the court at page 618 expressly limited its judgment in the following words: "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct." Neither the Suter case nor the Pollock case decides the question presented in the present case, and therefore do not support the plaintiffs' contention.

When rent from land has become due, it is personal property; it is a chose in action and does not pass by a conveyance of the land. *Burden v. Thayer*, 3 Met. 76.

If a lessor dies during the term, the rents accrued during his lifetime are personal property and pass to his administrator, while rents that accrue after his death go to his heirs, or to whoever may be entitled to the real estate subject to the demise. *Clark v. Seagraves*, 186 Mass. 430, 439.

So rent from real estate which has accrued is held to be taxable at the domicil of the lessor, *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, while the real estate from which rent is derived is taxable at its *situs*. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194.

In this Commonwealth taxes upon real estate are assessed to the owner or person who is in possession on the first day of April. St. 1909, c. 490, Part I, § 15. St. 1914, c. 198, § 2. St. 1915, c. 237, § 23.

In determining whether the language of the covenant in the lease in question is sufficiently comprehensive to impose upon the lessee the obligation to indemnify the lessors who have paid the taxes under the tariff act of 1913 depends upon the construction of the phrase "for or in respect of the said leased premises." These words are to be interpreted in accordance with their natural and ordinary meaning. Manifestly taxes upon the real estate come within the terms of the covenant. It is equally clear that taxes for betterment assessments under such a covenant would have to be paid by the lessee unless otherwise stipulated in the lease.

On the other hand, we cannot construe the phrase in question as including within its terms a tax assessed by the federal government to the lessor upon the rents reserved under the lease. Such an assessment is upon an entirely distinct kind of property than

is the assessment upon the real estate. While under the federal income tax law a tax on rent is a tax on land and so a direct tax, yet a tax on land is not a tax on rent; the defendant did not covenant to pay taxes for or in respect of the rent; his undertaking is to pay the taxes for or in respect of the premises. The covenant obligated the lessee to pay the taxes upon the real estate but not upon the income in the form of rent which arose therefrom.

In construing the covenant, it is plain that taxation upon real estate means one thing, and taxation upon income means another.

Under a covenant in a lease substantially like that under consideration, it was held that it did not include a tax upon the rent reserved. *Van Rensselaer v. Dennison*, 8 Barb. 23.

In *Woodruff v. Oswego Starch Factory*, 70 App. Div. (N. Y.) 481, affirmed in 177 N. Y. 23, it was held that it would not be a natural or reasonable construction of a similar covenant to interpret it as including a tax upon the rents reserved under the lease. In that case, the court uses this language: "Plaintiffs would be assessed in respect of the demised premises, and it would become the duty of the defendant to protect them and the premises against such assessment by paying the tax thereon. But when we pass beyond this class of assessments and assume one made against the lessor upon his income or rents received under a lease, and otherwise in no manner based upon or measured by the lands leased, their value, character or condition, it seems to us that it would be a strained construction to say that such tax was on account of, relating to, or 'in respect' of, the demised premises, within the meaning of the covenant." *Codman v. Johnson*, 104 Mass. 491. *Twycross v. Fitchburg Railroad*, 10 Gray, 293.

The argument that the lessors, under the covenant in the lease, intended that the amount of rent reserved should be the net income to be received by them from the property demised cannot prevail unless such intention appears from the language which the parties saw fit to employ. It would seem to us, as was said in *Woodruff v. Oswego Starch Factory*, *supra*, to be "a strained construction to say that such tax was . . . within the meaning of the covenant." *Robinson v. Alleghany County*, 7 Barr, 161, 163. *Catawissa Railroad v. Philadelphia & Reading Railway*, 255 Penn. St. 269, 271. *Northern Trust Co. v. Buck & Raynor*, 263 Ill. 222.

We have examined all the cases cited in the elaborate brief filed by the counsel for the plaintiffs. The early English cases so cited must be held to stand upon the facts peculiar to each which distinguish them from the case at bar. For instance, those cases which relate to church rates, poor rates, tithes and subsidies are all decided upon the language of the covenants with which they respectively deal, and do not seem to us to be in conflict with the conclusion which we have reached, nor do we find anything in the reasoning of any of the cases cited and relied on by the plaintiffs to the contrary.

It may readily be conceded that a tax "on" or "for" or "in respect of" leased premises means the same thing, and that no sound distinction exists between them.

What is meant by taxes for or "in respect of" the leased premises? The legal signification clearly is that the taxes are those which relate directly to the premises themselves and not to the rent reserved which, when due, is a separate and independent estate. The fundamental fact on which the rights of the parties depend is that the defendant never agreed to pay the taxes on the rent. In *Catawissa Railroad v. Philadelphia & Reading Railway*, 255 Penn. St. 269, it was said, "The income tax was not imposed by the government upon 'the demised premises or any part thereof.' . . . It was imposed upon rental received by the lessor from the lessee." The words chosen by the parties cannot fairly be extended by us beyond their natural or ordinary meaning, and therefore the defendant cannot be held liable for taxes which the covenant neither by express words nor reasonable implication obliged him to pay. *Smith v. Abington Savings Bank*, 165 Mass. 285. *Millard v. Monk*, 179 Mass. 22. *Van Rensselaer v. Dennison*, 8 Barb. 23. *Woodruff v. Oswego Starch Factory*, 177 N. Y. 23. *Williams v. Delaware, Lackawanna & Western Railroad*, 240 Penn. St. 234. *Tennant v. Smith*, [1892] A. C. 150.

In accordance with the terms of the report, the entry must be
*Judgment for the defendant.*¹

THE UNIVERSITY CLUB OF CHICAGO v. DEAKIN

265 Ill. 257. 1914.

MR. JUSTICE COOKE delivered the opinion of the court:

Defendant in error, the University Club of Chicago, brought suit in the municipal court of Chicago against Earl H. Deakin, the plaintiff in error, to recover rent alleged to be due under a lease. A trial was had before the court without a jury and resulted in a judgment for \$2007.66. Deakin prosecuted an appeal to the Appellate Court for the First District, where the judgment of the municipal court was affirmed. A writ of *certiorari* having been granted by this court, the record has been brought here for review.

On March 31, 1909, defendant in error leased to plaintiff in error, for a term of one year, a store room in its building at the corner of Michigan avenue and Monroe street, in the city of Chicago, at a rental of \$5000 for the year. The lease provided that plaintiff in error should use the room for a jewelry and art shop and for no

¹ Compare *Northern Trust Co. v. Buck*, 263 Ill. 222; *Des Moines Ry. Co. v. Chicago Ry. Co.*, 188 Iowa 1019; *Kimball v. Cotting*, 229 Mass. 541; *Park Building Co. v. Yost Fur Co.*, 208 Mich. 349.

other purpose. It also contained the following clause, numbered 12: "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." Shortly after this lease was made defendant in error leased to one Sandberg, for one year, a room in the University Club building, two doors from the corner, at a rental of \$2500. The following provision was inserted in the Sandberg lease: "It is further distinctly understood and agreed by and between the parties hereto that at no time during the term of this lease will the lessee herein use the demised premises for a collateral loan or pawnshop or make a specialty therein of the sale of pearls." On May 1, 1909, being the first day of the term of the lease, plaintiff in error took possession of the premises and thereafter paid the rent, in monthly installments, for May and June. During the latter part of June plaintiff in error, through his attorney, sought to obtain from defendant in error a cancellation of his lease on the ground that by leasing a room in the University Club building to Sandberg and permitting him to display and sell pearls therein defendant in error had violated the provision of plaintiff in error's lease above quoted, and that for such violation plaintiff in error was entitled to terminate the lease. Defendant in error refused to cancel the lease, and on June 30 plaintiff in error vacated the premises, surrendered the keys and refused to pay any further installments of rent. This suit was brought to enforce payment of subsequent installments of rent accruing under the lease for the time the premises remained unoccupied after June 30.

The evidence offered by plaintiff in error tended to show that Sandberg made a specialty of the sale of pearls in connection with the conduct of his general jewelry business ever since he took possession of the room leased to him, and that plaintiff in error vacated the premises and surrendered possession because of the failure of defendant in error to enforce the twelfth clause of his lease. The evidence offered by defendant in error tended to prove that Sandberg had not made a specialty of the sale of pearls, and that when plaintiff in error first made known his desire to assign or cancel his lease he gave as his only reason that his health was failing and that he had been advised by his physician to leave the city of Chicago.

Propositions were submitted to the court by both parties to be held as the law of the case. The court held, at the request of plaintiff in error, that the lease sued upon was a bi-lateral contract, and upon a breach of an essential covenant thereof by the lessor the lessee had a right to refuse further to be bound by its terms and to surrender possession of the premises, and that a breach of the twelfth clause of the lease would be a good defense to an action for rent if the tenant surrendered possession of the premises

within a reasonable time after discovery of the breach. The court refused to hold as law propositions submitted by defendant in error stating the converse of the propositions so held at the request of plaintiff in error. The court properly held that the lease in question was a bi-lateral contract. It was executed by both parties and contained covenants to be performed by each of them. The propositions so held with reference to the effect of a breach of the twelfth clause of the lease also correctly stated the law. By holding these propositions the court properly construed the twelfth clause as a vital provision of the lease and held that a breach of that provision by the lessor would entitle the lessee to rescind. Where there is a failure to comply with a particular provision of a contract and there is no agreement that the breach of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract. (*City of Belleville v. Citizens' Horse Railway Co.* 152 Ill. 171; *People v. Central Union Telephone Co.* 232 id. 260.) While there was no provision in this contract that plaintiff in error should have the option to terminate it if the terms of the twelfth clause were not observed, it is apparent that it was the intention of the parties to constitute this one of the vital provisions of the lease. It was concerning a matter in reference to which the parties had a perfect right to contract, and it will be presumed that plaintiff in error would not have entered into the contract if this clause had not been made a part of it. It is such an essential provision of the contract that a breach of it would warrant plaintiff in error in rescinding the contract and surrendering possession of the premises.¹

The court was not asked to make any finding of fact, and there is nothing in the record to indicate that the judgment is based upon any finding of fact. Whether Sandberg had, in fact, made a specialty of the sale of pearls was one of the controverted questions in the case. One of the propositions submitted by defendant in error and held by the court, stated that the conduct of a general jewelry business was not "making a specialty of the sale of pearls," within the meaning of the words quoted as they were used in the twelfth clause of plaintiff in error's lease. This can not be construed as a holding that Sandberg did not, in fact, in addition to his conduct of a general jewelry business, make a specialty of the sale of pearls.

The following proposition was submitted by defendant in error and held by the court as the law of the case:

"That plaintiff performed all the obligations imposed upon it by its covenant that it would not rent any other store in its building to a tenant making a specialty of the sale of pearls, by incorporating in its lease to the second tenant that said second tenant should not make a specialty of the sale of pearls in the demised premises."

¹ *Berman v. Shelby*, 93 Ark. 472, accord. See *In re Mullings Clothing Co.*, 238 F. R. 58. Compare *Rubens v. Hill*, 213 Ill. 523.

From a consideration of all the propositions of law held and refused, it appears that the judgment of the trial court was reached from the application of the proposition just quoted to the facts in the case. The court erred in holding this proposition as the law. By covenanting with plaintiff in error not to rent any other store in this building, during the term of plaintiff in error's lease, to any tenant making a specialty of the sale of pearls, defendant in error assumed an obligation which could not be discharged by simply inserting in the contract with the second tenant a covenant that such tenant should not make a specialty of the sale of pearls. It was incumbent upon it to do more than to insert this provision in the second lease. By the terms of its contract with plaintiff in error it agreed that no other portion of its premises should be leased to any one engaged in the prohibited line of business, and if it failed to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error terminating his lease and surrendering possession of the premises.

This precise question has never been passed upon by this court, so far as we are able to ascertain. Defendant in error cites and relies upon *Lucente v. Davis*, 101 Md. 526, which supports its theory. We cannot yield our assent to the doctrine there announced. Defendant in error cannot escape its obligation by the mere insertion of a clause in the lease with the second tenant prohibiting him from engaging in the line of business named. Plaintiff in error contracted for the exclusive right to engage in this particular business in that building. There was no privity between him and Sandberg, and he was powerless to enforce the provisions of the contract between defendant in error and Sandberg. It is idle to say that an action for damages for a breach of contract would afford him ample remedy. He contracted with defendant in error for the sole right to engage in this specialty in its building, and if defendant in error saw fit to ignore that provision of the contract and suffer a breach of the same, plaintiff in error had the right to terminate his lease, surrender possession of the premises and refuse to further perform on his part the provisions of the contract.

For the errors indicated the judgment of the Appellate Court and the judgment of the municipal court are reversed and the cause is remanded to the municipal court for a new trial.

Reversed and remanded.

LEAVITT v. FLETCHER

10 All. (Mass.) 119. 1865.

CONTRACT brought by a lessee against a lessor to recover damages for a breach of the covenant to repair. The material portions of the lease and the agreed facts upon which the case was submitted to the determination of the whole court are stated in the opinion.

GRAY, J. By the indenture upon which this action is brought the defendant "does lease, demise and let" to the plaintiff a brick stable standing on the lessor's own land, and a wooden carriage-house standing on land held by him under a lease from others, with a provision that if they shall require the termination of that lease and the removal of the carriage-house, the plaintiff may terminate this lease. The lessor "agrees to make all necessary repairs on the outside of said building." The lessee agrees to pay a certain rent monthly, and to quit and deliver up the premises to the lessor at the end of the term "in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessor;" not to make or suffer any waste thereof; and "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof. And said lessee is to make all necessary repairs on the inside of the building at his own expense."

The brick stable is the building mentioned in the lease next before the lessor's covenant to make outside repairs; but we have no doubt that this covenant includes all the premises leased by the defendant to the plaintiff, the carriage-house as well as the stable. Indeed in the duplicate indenture in the hands of the defendant the plural word "buildings" is substituted for "building" in this covenant.

The facts agreed by the parties are as follows: The carriage-house was a frame covered with matched boards, had a shingled roof and a plank floor, and on the inside was left uncovered by lath or plaster. While the plaintiff was occupying the premises under the lease, a quantity of snow accumulated upon the roof of the carriage-house, until, at the close of a heavy snow storm, the carriage-house fell from the weight of snow, crushing and injuring the plaintiff's carriages kept therein. The plaintiff afterwards demanded of the defendant that he should restore and rebuild the carriage-house, but the defendant refused to do so. There is nothing in the case to show that any negligence of either party contributed to the accident.

For five months succeeding the fall of the carriage-house, the plaintiff paid to the defendant, under protest, the rent reserved in the lease; and then, ceasing to pay rent, was ejected by the defendant. The lessee's covenant to pay rent was not affected

by the injury to the premises, nor limited by the exception of unavoidable casualty in his subsequent covenant, and is independent of the lessor's covenant to make outside repairs. *Belfour v. Weston*, 1 T. R. 310. *Hare v. Groves*, 3 Anstr. 687. *Kramer v. Cook*, 7 Gray, 550, and cases cited. And it is not now denied that the lessee was rightly required to pay rent, and lawfully ejected for failing to pay.¹

The lessee in this action claims damages, 1st. for the injury occasioned by the fall of the carriage-house; 2dly, for the failure of the lessor to rebuild it, after being expressly requested so to do.

It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation. *Dutton v. Gerrish*, 9 Cush. 89. *Foster v. Peyser*, Ib. 242, and cases cited. *Welles v. Castles*, 3 Gray, 326. The express covenant of the defendant in this case is only "to make all necessary repairs on the outside of the building." He does not covenant that the outside shall not give way, but that, if it does, he will repair it. He cannot therefore be held liable for the damages occasioned by the fall of the building.

But it has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger. Yearbook 40 Ed. III. 6. *Dyer*, 33 a. *Paradine v. Jane*, Aleyn, 27; *S. C. Style*, 47. *Compton v. Allen*, Style, 162. *Bullock v. Dommitt*, 6 T. R. 650. *Green v. Eales*, 2 Q. B. 225; *S. C. 1 Gale & Dav.* 468. *Phillips v. Stevens*, 16 Mass. 238. *Bigelow v. Collamore*, 5 Cush. 231. *Allen v. Culver*, 3 Denio, 294. *Dermott v. Jones*, 2 Wallace, 7, 8. The defendant's covenant contains no exceptions of natural causes or inevitable accident. "The outside of the building" includes the whole outer shell of the building, or external inclosure

¹ Decisions that covenants in leases are independent are numerous. See *Chipman v. Emeric*, 3 Cal. 273; *Arnold v. Krigbaum*, 169 Cal. 143; *Rubens v. Hill*, 213 Ill. 523; *Brown v. Bragg*, 22 Ind. 122; *Dennison v. Read*, 3 Dana (Ky.) 586; *Taylor v. Finnigan*, 189 Mass. 568; *Meredith Assoc. v. American Drill Co.*, 67 N. H. 450; *Stewart v. Childs Co.*, 86 N. J. L. 648; *Lutz v. Goldfine*, 72 Misc. (N. Y.) 25; *Thomson-Houston Co. v. Durant Land Co.*, 144 N. Y. 34; *Prescott v. Otterstatter*, 85 Pa. 534; *Johnson v. Gurley*, 52 Tex. 222; *Powell v. Merrill*, 103 Atl. (Vt.) 259, 261; *Dawson v. Dyer*, 5 B. & Ad. 584; *Supplice v. Farnsworth*, 7 M. & G. 576; *Edge v. Boileau*, 16 Q. B. D. 117.

Compare *Tedstrom v. Puddephat*, 99 Ark. 193.

A landlord, on abandonment of the premises by the tenant, is under no obligation to relet them; he may remain inactive and sue the tenant for rent as it matures. *Merrill v. Willis*, 51 Neb. 162; *Milling v. Becker*, 69 Pa. 182; *Goldman v. Broyles*, 141 S. W. (Tex. Civ. App.) 283; *California Bldg. Co. v. Drury*, 103 Wash. 577. And see *Rice v. Dudley*, 65 Ala. 68; *Respini v. Porta*, 89 Cal. 464.

Contra. *Hinde v. Madansky*, 161 Ill. App. 216 (semble.)

of roof and sides. *Green v. Eales*, above cited. "The necessary repairs on the outside" are those which will make the building outwardly complete. When those are made, then, and not before, the lessee will be bound by his covenant "to make all necessary repairs on the inside." The fact that rebuilding the outside will so far replace the whole building as to leave very little to be done on the inside, and thus make the performance of the lessee's covenant very easy, does not in any degree excuse the lessor from first performing his covenant. The defendant is therefore responsible for the damages suffered by the plaintiff by reason of the defendant's refusal to rebuild, from the time of that refusal until the ejectment of the plaintiff for not paying his rent; and according to the agreement of the parties the case must stand for the assessment of those damages.

*Judgment for the plaintiff accordingly.*¹

MCCARDELL v. WILLIAMS

19 R. I. 701. 1897.

MATTESON. C. J. The plaintiff brings this action in assumpsit, notwithstanding the fact that the lease is a sealed instrument, his theory being that it was void as a lease except as between the immediate parties to it, because it was not recorded. The case shows, however, that the plaintiff, when he purchased the reversion, took also a formal transfer of the lease to himself. Having had notice of the lease prior to his purchase of the estate, the statute in regard to recording has no application. We are of the opinion that the action should have been debt or covenant.

As it is probable that another suit may be brought, it may perhaps be well for us to give our opinion upon other questions which have been made.

The lease contains a covenant that the lessor, Wright, should keep the exterior of the leasehold premises in good repair. The plaintiff, as assignee of the reversion, took the interest in the leasehold premises subject to the burden of this covenant. 2 Tayl. Land. & T. §§ 437, 439. Where a landlord has covenanted to repair and does not do so, the tenant has several remedies: (a) He may abandon the premises if, by reason of want of repair, they have become untenable. *Sheary v. Adams*, 18 Hun. (N. Y.) 181; *Lawrence v. Burrell*, 17 Abb. (N. Y.) n. c. 312; *Prescott v. Otterstatter*, 85 Pa. St. 534; *Bizzell v. Lloyd*, 100 Ill. 214; *Lewis v. Chisholm*, 68 Ga. 40. (b) He may make the repairs and deduct the cost from the rent. *Sparks v. Bassett*, 49 N. Y. Super. Ct. 270; *Myers v. Burnes*, 35

¹ As to the liability in case of extraordinary casualties of one who has covenanted to repair, see 36 Am. L. Reg. (N. S.) 212; 1 Tiffany, Real Prop., 2d ed., pp. 139, 140; 1 Tiffany, Landl. and Ten., pp. 761-766.

N. Y. 269; *Wright v. Lattin*, 38 Ill. 293. (c) He may occupy the premises without repair, and recoup his damages in an action for the rent. *Westlake v. DeGraw*, 25 Wend. 669; *Wright v. Lattin*; 38 Ill. 293. (d) He may sue for damages for the breach of covenant to repair. *Lewis v. Chisholm*, 68 Ga. 40; *Block v. Ebner*, 54 Ind. 544; *Buck v. Rodgers*, 39 Ind. 222; *Hexter v. Knox*, 39 N. Y. Super. Ct. 109. And see 12 Am. & Eng. Ency. L. 726. The defendant requested the Common Pleas Division to rule in accordance with proposition (a), but the court refused to so rule and held that the only remedy of the defendant was that stated in proposition (c). We think the court erred in its ruling.

We think that payment of rent to the plaintiff by the defendant on June 29, 1894, on the plaintiff's threat of suit, must be regarded as an attornment by him to the plaintiff, though the payment was expressed to be merely for the use and occupancy of the premises, and was accompanied by a protest and the denial of the plaintiff's right to receive the money, and also a declaration that the defendant did not recognize the relation of landlord and tenant as existing between him and the plaintiff.

Case remitted to the Common Pleas Division with direction to enter judgment for the defendant for costs.¹

MORRISON v. CHADWICK

7 C. B. 266. 1849.

COLTMAN, J., delivered the judgment of the court.²

This was an action by a landlord against his tenant, founded on a promise to use the demised premises, during the continuance of the tenancy, in a tenant-like manner. The breach alleged, is, that, during the continuance of the tenancy, he used them in so untenant-like a manner that they became ruinous, &c. There was also a count for use and occupation, and there were the money counts.

To the first count of the declaration, the defendant pleaded, — secondly, that the plaintiff, during the continuance of the tenancy, and before any breach, entered into a certain part of the demised premises, to wit, the shed, and ejected, expelled, and put out the defendant from the possession thereof, whereupon the defendant, before any breach, and whilst he was so expelled, &c., wholly quitted, abandoned, and gave up to the plaintiff the residue of the demised premises, and the possession thereof, and the plaintiff has from thenceforward had the same, and the possession thereof.

¹ And see cases on wrongful eviction, *post*, p. 329 *et seq.*

An executory contract to take a lease of premises which the owner agrees to put in repair need not be performed, if the landlord breaks his contract. *Hickman v. Rayl*, 55 Ind. 551; *Hydeville Co. v. Eagle Rd. Co.*, 44 Vt. 395.

² The pleadings are stated in the opinion.

To this plea the plaintiff demurred, insisting that it amounted only to an argumentative denial of the allegation that a breach was committed during the tenancy.

For the defendant, it was said, that the plea was a good plea in confession and avoidance: for, it was insisted, that, when the plaintiff entered on his tenant, and evicted him from a part of the premises, the tenant was justified in relinquishing the possession of the remainder, and was no longer bound to perform the agreement he had entered into on becoming tenant. But we are of opinion that this proposition cannot be supported.

An eviction by a landlord of his tenant from a part of the premises, creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession: see the authorities cited in 1 Wms. Saund. 204, n. (2). But there is no authority for holding that the tenancy is thereby put an end to, or the tenant discharged from the performance of his covenants, other than the covenant for the payment of rent.

It may be urged, that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them. But it is to be borne in mind, that, in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction; by which, it is to be presumed that he will obtain satisfaction for any inconvenience or loss which he may suffer.

If the eviction of a part by the landlord will not discharge the tenant from the performance of the covenants of his lease, other than the covenant to pay rent, will the relinquishing the possession of the land, and the landlord's taking possession, have that effect? We think it will not; for the allegations do not show a dissolution of the tenancy by mutual consent. The tenancy, therefore, continues; and whilst the tenancy continues, the obligation to perform the covenants continues.¹ We think, therefore, the plea is bad.

The third plea alleges a surrender of the tenancy before any breach, by operation of law, — by the defendant's quitting possession of the lands demised, with the consent of the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff's accepting such possession, with the intention of putting an end to the tenancy.

It was contended, on the part of the plaintiff, that this plea was

¹ It would appear, therefore, that, where the lessor has evicted the lessee or assignee, or has taken possession with his assent, the lessee or assignee would, under a covenant to repair, be bound to re-enter upon the lessor for the purpose of doing the repairs. It would, of course, be a good answer to an action of covenant for not repairing, to say that the defendant was prevented by the plaintiff from entering. — REP.

bad, on the ground that the agreement stated in the plea, would not constitute a surrender by act and operation of law; and that the plea, unless it showed a surrender, furnished no answer to the declaration. And we agree that this is so; for the breach is admitted; and, if the tenancy continued, no answer is given to it.

If, however, it ought to be held — agreeably to what is said in *Grimman v. Legge*, 8 B. & C. 324; 2 M. & R. 438 — that the plea shows a surrender by act and operation of law, we think the plea is bad, on special demurrer, as amounting only to an argumentative denial that any breach had been committed during the continuance of the tenancy.¹

Judgment for the plaintiff.

ANDREWS v. NEEDHAM

Noy 75. 1598.

A. leases for years, by Indenture. N. covenants to repair, etc., and to yeild up all [the tenements well repaired²] at the end of the term. But during that, one Blunt enters by an elder title. If the Lessee be discharged of the Covenant to yield up all, etc. And it seem'd to the Court that he was. For if the Land be gone, the Obligation is discharged Ve. 20 H. 6. 45 E. 3. 8.

NOTE. — On implied covenants for quiet enjoyment, see *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N. Y. 370, *post*, p. 309; *Obermeier v. Mattison*, 98 Oreg. 195; 1 Tiffany, Real Prop., 2d ed., § 49.

On implied covenants for payment of rent, see 1 Tiffany, Landl. and Ten., pp. 1030-1035.

SECTION III.

RENTS

A. In General

At common law rents are distinguished as of three kinds: rent service; rent charge; and rent seck. — Rent service is the rent rendered for the tenure of land. The services of tenure consisted at common law in rendering to the lord profits of the land in money or in kind, or in performing for him work and labour or other duties which were equivalent to profits; but in process of time nearly all services became commuted, by agreement or usage, into fixed money payments, or rents in the ordinary meaning of the term. — Rent

¹ The rest of the opinion, relating to another point, is omitted.

Newton v. Allin, 1 Q. B. 518, *accord*. And see *Smith v. McEnany*, 170 Mass. 26, 28; *Carrel v. Read*, Cro. Eliz. 374.

² See Cro. Eliz. 656.

service was attended at common law with the remedy of distress; by which if the rent were in arrear and unpaid, or the services unperformed, the lord might enter upon the land during the tenancy, and seize any personal chattels there found, and detain them as a pledge for the payment of the arrears of rent or for the performance of the services.

Rent may be payable out of land independently of tenure. The owner of land, whether in fee or for life or for a term of years, may grant or assign the whole of his estate and interest in the land, leaving in himself no reversion, but reserving a rent; or he may grant to another a rent out of the land, reserving to himself the estate and possession. In such cases the rent has no connection with tenure and is not rent service, nor has it at common law the incidental remedy of distress. But a power of distress may be given or reserved by an express clause in the deed of grant or conveyance, with the effect of charging the land with the rent, which is then called a rent-charge.

A rent service may become disconnected with tenure by act of the reversioner, as if he conveys away the reversion to which the tenure is incident, but expressly reserves to himself the rent; or if he conveys away the rent separately, reserving the reversion and tenure. The rent is *primâ facie* an incident of the reversion, and passes to a grantee of the reversion unless expressly reserved; but not the reversion with the rent. By severing the rent from the tenure, the remedy of distress, which was an incident of the tenure, is no longer available at common law. Rents deprived of the remedy of distress, whether originally so created, or becoming so by a subsequent act, were called rents seck.

But by the Statute 4 Geo. II. c. 28, s. 5, it was enacted that "all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same in cases of rents seck, rents of assize and chief rents, which have been duly answered or paid for the space of three years, within the space of twenty years before the first day of this present session of Parliament, or shall be hereafter created, as in case of rent reserved upon lease." Rents seck issuing out of or charged upon freehold interests in land without express power of distress are distrainable under this statute; but rent seck issuing out of a term of years or chattel interest seems to have been considered not to be within the statute.¹ — Now by the Conveyancing Act, 1881, 44 &

¹ "I am of opinion that the instrument in question amounts to an absolute assignment of the defendant's interest in the two farms; and that, therefore, this distress cannot be supported. In the case in *Wilson* [——— v. *Cooper*, 2 Wills. 375], the defendant avowed under a distress for *rent* due from the plaintiff to him upon an *assignment* of a lease of a term for years to the plaintiff; and the question was, Whether that was a *rent* for which a distress would lie? Though there was a rent reserved upon that instrument, the court held that the assignor, having granted all his estate in the

45 Vict. c. 41, s. 44, the remedy of distress is given, subject to the conditions of the Act, "where a person is entitled to receive out of any land, or out of the income of any land, any annual sum payable half yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion." The remedy of distress, therefore, is now attendant upon every species of rent, either by common law, or under an express clause of distress; or by statute.¹

Rent service is said to be *reserved*, as distinguished from a specific part of the land which may be *excepted*. In technical language an *exception* refers to a part of the tenement granted and of a thing *in esse*, and it leaves the part excepted in the grantor as before; a *reservation* of rent creates a new right which did not exist before, issuing out of the tenement to the use of the grantor. — Rent service may be reserved by any conveyance that is effective to pass an estate, leaving a reversion in the grantor to which tenure may be incident. It may be reserved upon a deed of grant operating at common law, or under the Statute of Uses, or by way of appointment under a power, or upon a grant of a reversion or remainder, or upon a lease for life or for years, or upon a parol lease where such a lease is effective. It may be reserved by deed poll, for when the grantee accepts the deed, he agrees to the rent, and the rent is reserved by the words of the grantor and not by the grantee. — It may be reserved upon a devise by will of a particular estate; a rent service is thereby created which is incident to the reversion, and passes with it to the heir or devisee of the testator. But in the case of two independent devises of the land and of the rent, it is not rent service but a rent seck; unless charged upon the land by a special clause of distress, which would make it a *rent charge*.

Rent service, properly so called, can be reserved only to the grantor or lessor of the particular estate out of which it issues, who retains the reversion to which the rent is incident; it cannot be reserved to a stranger to the estate. Payment of rent to a stranger may be imposed as the condition of an estate, with a right of re-entry for breach of the condition; but it is not properly a rent, nor can the stranger take advantage of the condition by entry.

At common law, before the Statute of *Quia Emptores*, 18 Edw. I. c. 1, "if a man had made a feoffment in fee simple, by deed or

term, could not distrain; and in giving their judgment, referred to Brooke's Abridgment, tit. Dette, pl. 39, where the Year Book, 43 Edw. 3, 4, is cited for the following proposition: 'If a man hath a term for years, and grants all his estate of the term, rendering certain rent, he cannot distrain if the rent be in arrear.' I am of opinion that the plaintiff is entitled to judgment." — *Per* DALLAS, C. J., in *Parmenter v. Webber*, 8 Taunt. 593, 595 (1818). And see *Preece v. Corrie*, 5 Bing. 24; *The King v. Wilson*, 5 M. & Ryl. 140, 157-162; 2 Tiffany, Landl. and Ten. pp. 1988, 1989 and note 28.

¹ But see *Lewis v. Baker*, [1905] 1 Ch. 46, *post*, p. 291.

without deed, yielding to him and to his heirs a certain rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service as the feoffor held of his lord next paramount."¹ After the statute, a feoffment in fee created no new tenure to the feoffor, but the feoffee held the land immediately of the lord next paramount by force of the statute; and if a new rent was expressed to be reserved, it was not rent service, nor was there any right of distress without an express clause to that effect, making it a *rent charge*. — The statute applied only to the alienation of the whole fee; and if a grant was made for a particular estate, in tail or for life, rendering a certain rent, the reversion remaining in the grantor; or if several particular estates were granted in succession, leaving a reversion in the grantor, the rent was rent service and attended with the right of distress. If the grant was made for a particular estate with remainder over in fee, leaving no reversion in the grantor, the grantees held of the superior lord by force of the statute; the rent reserved was not rent service and there was no right of distress, without an express clause.

If a lease be made for a term of years, reserving rent, it is a rent service, and the lessor may distrain at common law. By the Statute of Frauds, 29 Car. II. c. 3, s. 1, it is required that all leases should be made in writing and signed; and by 8 & 9 Vict. c. 106, s. 3, it is required that leases required to be in writing, shall be made by deed. But the Statute of Frauds, s. 2, excepts "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds part at the least of the full improved value of the thing demised." Therefore in leases by parol within the exception rent service may be reserved, as in a lease at common law. — If a lessee for a term of years makes an underlease for a less term leaving a reversion, however small, and reserving a rent, it is a rent service at common law with a right of distress. And a tenant from year to year, underletting for a term of years, has a reversion with a right of distress. But upon an assignment of a term of years, leaving no reversion in the assignor, but reserving a rent, there is no tenure and consequently no rent service strictly so called, nor any right of distress at common law; and an underlease for the whole term is equivalent to an assignment in this respect.

Rent may be reserved on a tenancy at will and the lessor may distrain for arrears; but it is not rent service strictly so called, because there is no tenure. — Leake, *Uses and Profits of Land*, pp. 373–377.²

¹ Lit., § 216.

² See Lit., §§ 213–228; 233–240, 346, 565; Harrison, *Chief Rents*, pp. 2–6.

As to which of the United States have preserved the law of distress, see 2 Taylor, *Landl. and Ten.*, 9th ed., §§ 558, 559.

PRESCOTT v. BOUCHER

3 B. & Ad. 849. 1832.

REPLEVIN. Avowry by the defendant as executor of the last will and testament of William Boucher, deceased, stated that the plaintiff from the 25th of March, 1829, until and after the 25th of March, 1830, and from thence until and at the time of the death of the said W. Boucher, held and enjoyed the premises mentioned in the declaration, &c., as tenant to W. Boucher by virtue of a demise thereof to him the defendant theretofore made at the yearly rent of £70, and because £70 of the rent for the space of one year ending on the 26th of March, 1830, was due, and unpaid until and at the time of the death of W. Boucher, and from thence until and at the said time when, &c., continued in arrear from the plaintiff to the defendant, as such executor, he the defendant as such executor avowed, &c. Plea in bar by the plaintiff, that the said W. Boucher at the time of the making of the said demise in the avowry mentioned, and from thence until and at the time of his death, was seised in his demesne as of fee of and in the said premises, in which, &c., and that the said demise under which the plaintiff held and enjoyed the same, &c., at the yearly rent in the avowry mentioned, was a certain demise thereof, heretofore, to wit on the 25th of March, 1825, made by the said W. Boucher, in his lifetime to the plaintiff for a term of years still unexpired, to wit, the term of seven years. General demurrer and joinder. This case was argued in last Easter Term.¹

Cur. adv. vult.

LORD TENTERDEN, C. J., in the course of this [Trinity] term delivered the judgment of the court.

The question raised upon this record is this, Whether the executor of a person who was seised in fee of land and demised it for a term of years, reserving a rent, can distrain for the arrears of such rent, accrued in the lifetime of the testator. At common law it is clear that he could not so distrain, and his power to do so, if he has any, must be derived from the provisions of the Statute 32 H. 8, c. 37, § 1.

The preamble of that Statute is material because the enacting part of the first section has no words distinctly describing the persons whose executors are empowered to distrain; but refers to the preamble by the word "such."

The preamble and first section of the Act are as follows: "Forasmuch as by the order of the common law, the executors, or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of lives, or rents services, rent charges, rents secks, and fee farms, have no remedy to recover such arrearages of the said rents

¹ Before LORD TENTERDEN, C. J., LITLEDAL, PARKE, and PATTESON, JJ.

or fee farms, as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain, or have any lawful action to levy any such arrearages of rents or fee farms, due unto him in his life as is aforesaid; by reason whereof, the tenants of the demesne of such lands, tenements or hereditaments, out of the which such rents were due and payable, who of right ought to pay their rents and farms at such days and terms as they were due, do many times keep, hold, and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee farms are due, cannot have or come by the said arrearages of the same, towards the payment of the debts and performance of the will of the said testators: for remedy whereof be it enacted, &c., that the executors and administrators of every *such person or persons*, unto whom any such rent or fee farm is or shall be due, and not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants that ought to have paid the said rent or fee farms so being behind in the life of their testator, or against the executors and administrators of the said tenants; and also furthermore, it shall be lawful to every such executor and administrator of any such person or persons unto whom such rent or fee farm is or shall be due, and not paid at the time of his death as is aforesaid, to distrain for the arrearages of all such rents and fee farms, upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents or fee farms, and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain and be in the seisin, or possession of the said tenant in demesne who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form, as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid."

Looking at these words independently of decided cases, it should seem that the Legislature meant to provide remedy for those only who were previously without any remedy, by action or otherwise; and the Statute provides a double remedy, namely, by action of debt and by distress. What persons had a remedy by action of debt, and the reasons why they had it, will be found laid down in Bacon's Abridgment, tit. Rent (K) 6, referring to Gilbert on Rents, 93, Co. Lit. 162, and *Oguel's Case*, 4 Co. 49. The passage is as follows: "The remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rents; the reason whereof is this: Actions of debt were given for rent reserved upon leases

for years, for that such terms being of short continuance, it was necessary that the lessor should follow the chattels of his tenant, wherever they were, or wheresoever he should remove them: but when the rents were reserved on the durable estate of the feud, the feud itself, and the chattels thereupon were pledged for the rent; and if the land were unstocked for two years, the lord had his *cessavit per biennium* to recover the land itself; and hence it is that if the durable estate of the feud determined, as if the lessee for life died, the lessor might have an action of debt for the arrears: because the land was no longer a security for the rent, and therefore the chattels of the tenant were liable to satisfy the arrears in an action of debt wherever the tenant removed them. So it was in the case of a rent charge; for if a man were seised of it in fee, and it was arrear, he could have no action of debt for the arrears; and if he died, his heir could not have any real action for the arrears, for that is proper for the recovery of the possession, which was still in him, nor could he have a personal action, because, besides the former reason, it were absurd to give a real action for the rent running on in his own time, and a personal action for the arrears in the lifetime of the ancestor at the same time; for it could not be supposed to be both a real and personal thing; for this reason also, the executor could have no action for the arrears, (who is entitled to the personal estate), and also because he could not entitle himself by virtue of the contract that created the rent, since the heir was constituted representative by the contract, and by consequence that representation excluded all other persons from taking any benefit as representatives that did not come under that character."

The view of the Statute which has been above suggested, was acted upon in the case of *Turner v. Lee*, Cro. Car. 471, in which it was held, that where a rent charge had been granted for years, if the grantee should so long live, the executor of the grantee could not distrain under the Statute, because he had a remedy by action of debt at the common law. If this construction had always been adhered to, the present case would be clear; but a different view of the Statute seems to have been taken in a previous case of *Lambert v. Austin*, Cro. Eliz. 332, in which it was assumed that the executor of the grantee for his own life of a rent charge could distrain under this Statute, although it is plain that such executor had a remedy by action of debt at common law, the estate for life in the rent having been determined. And in *Hool v. Bell*, 1 Ld. Raym. 172, the point was expressly so held. It was there argued that the expression "tenants for life" in the Statute must be taken to mean tenants *pour autre vie*, whose executors were certainly without remedy during the life of *cestui que vie*; but the court said: "The Statute is a remedial law, and shall extend to the executors of all tenants for life, and the law has been taken so always since the Statute, and has never been questioned, and the words of the Statute are general

enough to extend to all. And in *Lambert v. Austin* this seems to be admitted, and therefore the rule in *Turner v. Lee*, so generally taken, cannot be law." The case of *Hool v. Bell* appears to have been always treated as good law, and it must be considered that the Statute 32 H. 8, c. 37, is not confined to persons who had no remedy at all previously.

The question then is whether the present case be within the words or meaning of the Statute. The words are "executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of lives, or rents services, rent charges, rents secks and fee farms." Nothing is said as to tenants for term of years. If therefore the testator in the present case was tenant for term of years, his executor is not within the words of the Statute. If the testator was tenant of the *rent* at all, it seems difficult to say that he was tenant for a longer time or for a greater estate, than the rent could have continuance; it seems absurd to say that a man is seised in fee of a rent, the duration of which is limited to a few years, or to a particular life. In the case of a rent charge granted for years, it is impossible to say that the grantee is within the words "tenant in fee simple, fee tail, or for term of lives," and why should a lessor who reserves a rent to himself and his heirs, by a lease for years, be thought to be within the same words? The reasons which are pressed in argument are that the rent is incident to the reversion, that the lessor is seised in fee of the reversion, and must therefore be seised in fee of the rent which is incident to it; and that he cannot be tenant for years of the rent, for if he were, it would go to his executors on his death, whereas, by law, it is incident to the reversion and passes with it. This argument may be very forcible to show that the lessor who has demised for years, is not tenant for years of the rent; but it does not follow that he is tenant in fee simple, fee tail, or for term of lives, of the same rent. It is true that in the present case the testator was seised in fee of the land before he made a lease for years; after making that lease, he continued seised in fee of the land, seised of the immediate freehold, but, in respect to the right of possession, having a reversionary estate expectant on the determination of the lease for years: he still continues tenant of the freehold in every legal sense, and is not tenant of the *rent* at all in the legal sense of the word "*tenant*," as used in the Statute in question.

Where indeed the rent is reserved on a lease for life, or a gift in tail, the lessor or donor parts with the immediate freehold in the land; he has only a reversionary estate expectant on the determination of the immediate estate of freehold which is in another; and during that estate of freehold, he is strictly tenant of the rent in a legal sense, though it be a rent service and be incident to the reversion: his remedy for the rent is by writ of assize, and not by a personal action of debt. If the lease be for life, he is tenant for

life of the rent; if it be a gift in tail, he is seised of the rent during the continuance of the estate tail. It is true that since the Statute *Quia Emptores*, no one can reserve a rent service on a conveyance in fee; but the Statute 32 H. 8, c. 37, may allude by the words "tenants in fee simple of a rent service," to rent services created before the Statute *Quia Emptores*, of which there are still many which are called quit rents. Or the words of the Statute may be taken *reddendo singula singulis*, and applying the words "tenants in fee simple, tenants in fee tail," to rent charges and fee farms.

For these reasons we are of opinion that a person seised in fee of land and demising it for years, reserving a rent, though he be not tenant for years of the rent, is still not within the words of this Statute "tenant in fee simple, fee tail, or for term of lives," of the rent, and is indeed not tenant at all of the rent.

It remains to be considered whether he is within the meaning of the Statute.

It is matter of history that at the time when this Statute passed, leases for years were but little regarded. It is clear also that an action of debt for rent on such leases was maintainable. Such leases therefore do not appear to have been within the mischief intended to be remedied by the Statute, nor probably within the contemplation of the framers of the Act, and Lord Coke in his observations on this Statute, Co. Lit. 162 b, makes no allusion to leases for years, and evidently considers the Statute as applicable only to freehold rents.

Some authorities upon this subject remain to be noticed. The first is the case of *Turner v. Lee*, already cited, which arose on a lease for years determinable on a life, and the Statute was held not to apply. The point does not appear to have been raised in any reported case from that time till the case of *Renvin v. Watkin*, Mich. T. 5 Geo. 2, B. R., which is to be found in the first vol. of Selwyn's *Nisi Prius*, p. 678 of the 8th edition. It is as follows: "A. seised in fee let to the plaintiff for twenty-one years, and afterwards died seised of the reversion: the defendant administered, and distrained for half a year's rent due to the intestate, for which he avowed. On demurrer to the avowry it was objected that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by him. And it was observed that this was a case out of the Statute 32 H. 8, c. 37, for that only gives a remedy by way of distress for rents of freehold, and of this opinion the court seemed. 1 Inst. 162 a, 4 Rep. 50, Cro. Cor. 471, Latch. 211 (*Wade v. Marsh*), were cited." There is a note as follows:—

"But in *Powell v. Killick*, Middlesex Sittings, M. 25 G. 2, where in trespass for entering plaintiff's house and carrying away his goods, upon not guilty, defendant gave in evidence that he was executor of A. who was plaintiff's landlord of the house and that

he distrained for rent due to his testator at the time of his death; it was objected for plaintiff that executor was empowered to distrain only by virtue of the Statute 32 H. 8, c. 37, and that the Statute extended to the executors and administrators of those persons only to whom rent services, rent charges, rents seck, or fee farms were due, and that the present case did not fall within either of those descriptions. But Lee, C. J., overruled the objection, and said this was a rent service, the testator being in his lifetime seised in fee, and the plaintiff holding under a tenure which implied fealty." It is to be observed that this was a *nisi prius* decision, and the point argued seems to have been only whether the rent was a rent service, which it clearly was. The point now raised does not seem to have been discussed, and it should also be observed, that Mr. Justice Buller in his *Nisi Prius*, p. 57, cites the case and apparently disapproves of it. His words are: "Lord Coke says, if a man make a lease for life, or a gift in tail, reserving a rent, this is a rent service within the Statute: from whence it may be inferred that he thought a rent reserved upon a lease for years was not within it: and I apprehend that it is not, for the landlord is not tenant in fee, fee tail, or for life, of such a rent; and it is the executors of such tenants only who are mentioned in the Act. However, in trespass, where it appeared that the defendant had distrained the plaintiff's goods for rent due to his testator upon a lease for years, Lord C. J. Lee held it to be within the Statute, and the defendant obtained a verdict."

The next case was *Meriton v. Gilbee*, 8 Taunt. 159, where the point was attempted to be raised; but the court said, that it did not appear whether the tenancy was for term of years or for life. Then came the case of *Martin v. Burton*, 1 Brod. & B. 279, which was decided on the ground that it did not appear that the testator was not seised in fee, in tail, or for life. Afterwards the case of *Stanford v. Sinclair*, 2 Bing. 193, was decided on the same ground, though the court in giving judgment examine into some of the cases, and into the point now raised, which was not necessary to the determination of the case.

Upon the whole, therefore, and for the reasons stated, we are of opinion that this case is neither within the words nor the meaning of the Statute 32 H. 8, c. 37, §1, and that the judgment of the court must be for the plaintiff. *Judgment for the plaintiff.*¹

¹ See Stat. 3 & 4 Will. 4, c 42, §§ 37, 38.

THOMAS v. SYLVESTER

L. R. 8 Q. B. 368. 1873.

DECLARATION: That the plaintiff, being seised in fee of certain messuages and hereditaments situate, &c., by indenture bearing date the 15th of January, 1870, made by and between the plaintiff on the one part, and one David Cotter of the other part, granted and conveyed the messuages and hereditaments (subject to and charged and chargeable with the payment forever to the plaintiff, his heirs and assigns, of a certain yearly rent-charge of £2 8s. 6d. payable out of each of the said messuages and hereditaments on the 24th of June and the 21st of December in each year), unto and to the use of Cotter, his heirs and assigns; and Cotter in the indenture covenanted for himself, his heirs, executors, and administrators, that he, his heirs, executors, administrators, or assigns, would pay unto the plaintiff, his heirs or assigns, the yearly rent-charge on the days aforesaid. That afterwards all the estate of Cotter in the premises became vested in the defendants; and while the estate was so vested in the defendants, to wit, on the 24th of June, 1871, the rent-charge accrued due and became and was payable from the defendants to the plaintiff; yet the defendants did not pay the same, and the same remains wholly due and unpaid.

Demurrer and joinder in demurrer.

BLACKBURN, J. I think the only question which it is necessary to decide is, whether the plaintiff, the grantee of the rent-charge, is entitled to compel the terre-tenants to pay it by a personal action. I may remark that the indenture may be regarded as containing a grant in fee of a rent-charge under the Statute of Uses, and that a rent having been duly created, debt will lie. Under the old law the remedy to recover a freehold rent was by real action, and as long as the freehold continued, debt could not be maintained; but when the freehold estate came to an end, then, inasmuch as a real action could no longer be brought, debt would lie at the suit of the person entitled to the rent-charge. Thus, where a rent was granted for life the only remedy was by real action, but when the life had dropped, debt was maintainable. *Leving's Case*, cited in a note to Fitzherbert, *Natura Brevium*, p. 121, is a distinct authority that where a rent-charge for life had been created, issuing out of a manor which was afterwards conveyed to an assignee, and the rent-charge became in arrear, an action of debt would lie against the assignee of the manor upon the expiration of the life estate, when, according to the old law, a real action could no longer be brought to recover the arrears. *Leving's Case* is important, as showing that the action of debt is maintainable against an assignee, and it is precisely in point in the present case, where the plaintiff seeks to recover the rent-charge against the assignees of the land. If

the present case had occurred before the passing of 3 & 4 Wm. 4, c. 27, the rent-charge being in fee, the plaintiff would have been driven to a real action to recover it. But the Legislature having by that Act abolished real actions, we have to consider the question, whether we must not apply the principle of the common law to the present case. The principle was, that, when the estate for life had terminated, an action of debt for arrearages would lie. It seems to me to follow, upon a similar principle, that when the real action has been abolished, the grantee of a rent-charge in fee may maintain an action of debt against the terre-tenant; and this was the opinion of Pollock, C. B., in *Varley v. Leigh*, 2 Ex. 446; 17 L. J. Ex. 289, though that opinion was not necessary to the decision, and Rolfe, B., did not concur. The authorities brought before us, however, were not cited. I think that, real actions being now abolished, debts will lie; and that the authorities show that it will lie against the assignee of the land as well as against the original grantor.

This is not a question of a covenant running with the land, but whether, where there is a rent in fee issuing out of land, the owner of the rent may not sue the terre-tenant in debt, although the terre-tenant was not the original grantor. It seems to me that, according to authority, reason, and justice, he may maintain the action.

QUAIN, J. I am of the same opinion. The distinction in the old books appears to be this: "If a rent were granted for years, debt would lie, but if it were granted in tail, or for life, debt would not lie for arrears until after the freehold had determined; but when the freehold had determined, then debt would lie, and the reason assigned was that the freehold remedy must be pursued, because the law did not suffer a real injury to be remedied by an action merely personal. Putting aside the remedy by real action, would debt have lain against an assignee who is in possession of the same estate in the land as the grantor of the rent? That appears to be decided in *Sir W. Loringe's Case*, cited in *Oguel's Case*, 4 Co. Rep. at f. 49 b, thus: "A man was grantee for life of a rent out of a moiety of a manor, of which moiety a man was seised in right of his wife; the rent was in arrear when the grantee died, and the executors brought an action of debt against the husband only for the arrears. It was resolved: 1. That by the death of the grantee for life, the grant for life was turned into nature of debt. 2. Forasmuch as the husband took the profits of the land charged with the rent when it was arrear, he only, without his wife, should be charged with an action of debt." The action was against the person who is called the pernor of the land, provided he had the same estate as the grantor. I apprehend that the reason is that the land is the debtor, as is stated by Wilson, J., in *Mills v. Auriol*, 1 H. Bl. at p. 445. If a man comes into possession of land as tenant in fee, he is the pernor of the profits of the land, and was liable to a real action for the non-payment of a rent-charge created by a former

tenant in fee; if this be so, since real actions are abolished, an action of debt will lie.

I agree it is not necessary to go into the question whether the covenant runs with the land.

ARCHIBALD, J. I also agree in thinking there is no necessity to consider the question in what cases covenants run with the land. It seems to me to be a question of remedy. When we enter into the reasons why debt would not lie for the recovery of the arrears of a freehold rent-charge, it is clear that there was no oversight in abolishing real actions without providing for cases of this kind. The reason why debt did not lie was that the law did not suffer the right injured to be amended by an action merely personal. It is clear from *Leving's Case* that where no real action could be brought, debt would lie; and inasmuch as the abolishing of real actions has removed that remedy, I quite agree with my Brothers Blackburn and Quain that in the present case the action of debt is maintainable, and therefore our judgment must be for the plaintiff.

*Judgment for the plaintiff.*¹

ST. 8 ANNE, c. 14, § 4. And whereas no action of debt lies against a tenant for life or lives, for any arrears of rent, during the continuance of such estate for life or lives, be it enacted by the authority aforesaid, That from and after the said first day of May, it shall and may be lawful for any person or persons, having any rent in arrear or due upon any lease or demise for life or lives, to bring an action or actions of debt for such arrears of rent, in the same manner as they might have done, in case such rent were due and reserved upon a lease for years.

§ 6. And whereas tenants *pur auter vie* and lessees for years, or at will, frequently hold over the tenements to them demised, after the determination of such leases: and whereas after the determination of such, or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof; it is hereby further enacted by the authority aforesaid, That from and after the said first day of May, one thousand seven hundred and ten, it shall and may be lawful, for any person or persons, having any rent in arrear or due upon

¹ See 13 Law Quar. Rev. 288.

In England at common law apparently neither the benefit nor the burden of a covenant to pay a fee-farm rent ran. *Brewster v. Kidgill*, 12 Mod. 116; *Milnes v. Branch*, 5 M. & S. 411; *Randall v. Rigby*, 4 M. & W. 130. 135. See 1 Smith L. C., 9th ed., 91; Sugden, Vendor and Purch., 14th ed., 593-596.

The contrary, however, has been decided in the United States. *Scott v. Lunt*, 7 Pet. (U. S.) 596; *Van Rensselaer v. Read*, 26 N. Y. 558; *Tyler v. Heidorn*, 46 Barb. (N. Y.) 439; *Streaper v. Fisher*, 1 Rawle (Pa.) 155; *Herbaugh v. Zentmyer*, 2 Rawle, (Pa.) 159; *Hannen v. Ewalt*, 18 Pa. 9; *Cook v. Brightley*, 46 Pa. 439. But see *Van Rensselaer v. Platner*, 2 Johns. Cas. (N. Y.) 24.

any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined.

§ 7. *Provided*, That such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due.¹

WEBB v. JIGGS

4 M. & S. 113. 1815.

DEBT. The plaintiff declares that one J. Webb was seised in fee of certain lands at Iver, in Buckinghamshire, and being so seised, by his will, duly executed according to the Statute, gave and bequeathed to the plaintiff an annuity or yearly rent of £10 to be issuing and payable yearly and every year during the life of the defendant Martha out of the said lands, and also gave and bequeathed the said lands to the said Martha and her assigns for her life, she paying thereout in manner aforesaid to the plaintiff the said annuity or yearly rent, and afterwards the said J. Webb died, and his will was duly proved, whereupon the said Martha became seised as of a freehold for her life of the said lands, and the plaintiff became entitled to the said annuity or yearly rent, and afterwards the said Martha married the other defendant Jiggs, whereby they became seised of the lands as of freehold in right of the said Martha for her life, and so the plaintiff avers that while they were so seised, and were the perners of the profits thereof, £75 of the said annuity or yearly rent, for seven years and a half, ending on the 25th of March 1814, became due from the defendants as the perners, and still is in arrear and unpaid, whereby *actio accrevit, &c.*

Demurrer. Joinder.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J., on this day delivered the judgment of the court. After stating the pleadings, His Lordship said: This demurrer was argued at our sittings before Hilary Term in Serjeants' Inn Hall, when it was contended on the part of the defendants, in support of the demurrer, that at the common law an action of debt will not lie for a rent or annuity in fee, in tail, or for life, while it continues a freehold interest. And this position was not denied on the other side, but it was contended that it applied only to legal common law estates, and not to devises by will; and what appears to have been said by Holt, C. J., in *Ewer v. Jones*, reported in 2 Ld.

¹ For legislation in the United States, see 2 Tiffany, Landl. and Ten., p. 1819, note 7.

Ray. 937, Salk. 415, and 6 Mod. 26, 27, was relied on; viz., "That a devisee may maintain an action at common law against the terretenant for a legacy devised payable out of land. For where a Statute, as the Statute of Wills, 32 & 34 H. 8, gives a man a right, he shall have an action to recover it of consequence; because his right is created by Act of Parliament." But what Lord Holt is there stated to have said does not reach this objection; it is said only generally of a legacy or sum of money, not of an annuity or rent for life, in tail, or in fee; and it is to be observed, that in the case of a legacy payable out of land, unless the legatee had his remedy by action of debt, founded on the Statute, he would be wholly without remedy in the courts of common law; whereas the annuitant would not be remediless, but would have an assise to recover his annuity. And no authority has been stated where the general rule of law, which excludes the action of debt as a remedy for rent or annuity in fee, in tail, or for life, has been confined to annuities or rents created by common law conveyances, as contradistinguished from annuity or rents created by devise, nor does there seem any reason for making the distinction. It was next contended on behalf of the plaintiff, that this case was within the provisions of the 4th section of Stat. 8 Ann. c. 14, "for the better security of rents, and to prevent frauds by tenants;" but the language both of the title of the Act, and of the enacting clause, shows that the Legislature contemplated only the case of rent due from a tenant, holding by lease or demise under his landlord, — which is not this case; this being the case of two distinct and independent devises, of the land to one person for life, and to another of an annuity issuing out of the same for the life of the devisee of the land, created by the will of one and the same devisor, and without any such original privity between the devisee of the land charged with the annuity, and the devisee of the annuity charged thereupon, as subsists between a lessor and his lessee. We are therefore of opinion that the action of debt is not maintainable on the ground of this Stat. of Ann. c. 14, any more than it is upon the other ground already considered.

WALKER'S CASE

3 Co. 22a. 1587.

THE case was in effect:¹ Walker leased certain lands to Harris for years, the lessee assigned all his interest to another, Walker brought an action of debt against Harris for rent behind, after the assignment, and whether the action were maintainable or not, was the question. . . . On great deliberation and conference with others, it was adjudged by WRAY, L. C. J., SIR THOMAS GAWDY, and the

¹ Part of the case is omitted.

whole Court of King's Bench, that the action would lie (after such assignment).

And first for the apprehending of the true reason of this case, and of all the other cases, which have been urged on the other side, for the law always, and in all cases, is consonant to itself), it is to be known, that as to the matter now in question there are three manner of privities, *scil.* privity in respect of estate only, privity in respect of contract only, and privity in respect of estate and contract together: privity of estate only; as if the lessor grants over his reversion (or if the reversion escheat) between the grantee (or the lord by escheat) and the lessee is privity in estate only, so between the lessor and the assignee of the lessee, for no contract was made between them. Privity of contract only, is personal privity, and extends only to the person of the lessor and to the person of the lessee, as in the case at bar, when the lessee assigned over his interest, notwithstanding his assignment the privity of contract remained between them, although the privity of estate be removed by the act of the lessee himself; and the reason thereof is, —

First, because the lessee himself shall not prevent by his own act such remedy which the lessor hath against him by his own contract, but when the lessor grants over his reversion, there, against his own grant, he cannot have remedy, because he hath granted the reversion to another, to which the rent is incident.

Secondly, the lessee may grant the term to a poor man, who shall not be able to manure the land, and who will, for need or for malice, suffer the land to lie fresh, and then the lessor will be without remedy either by distress or by action of debt, which would be inconvenient, and in effect concerns every man, (for, for the most part, every man is a lessor or a lessee); and for these two reasons, all the cases of entry by wrong eviction, suspension and apportionment of rent are answered: for in such cases either it is the act of the lessor himself, or the act of a stranger; and in none of the said cases the sole act of the lessee himself shall prevent the lessor of his remedy, and introduce such inconveniences, as hath been said.

The third privity is of contract and estate together, as between the lessor and the lessee himself; and WRAY, Chief Justice, and SIR THO. GAWDY said, that as he who is a bastard born hath no cousin, "so every case imports suspicion of its legitimation, unless it has another case which shall be as a cousin-german, to support and prove it." And therefore it was agreed by the whole court, that if there be lord and tenant, and the tenant makes a feoffment in fee, in this case betwixt them for the arrearages due as well before the feoffment as after, till notice, &c., it is only privity as to avowry, and not any privity in estate or in tenure, which privity shall not go with the estate, and yet it is more in the realty than the case at bar; *a fortiori* in the case at bar, when the lessee assigns his interest, yet privity of contract between the lessor and lessee, as to the action of debt,

remains. And at the common law, before the Statute of *Quia Emptores terrarum*, if the tenant made a feoffment in fee to hold of the the chief lord, the feoffee could not by any tender that he could make, compel the lord to avow on him, but the lord always might avow on the feoffor, as appears in 33 E. 3, *Avowry*, 255. For by his own act he cannot change the avowry of his lord; which is a stronger case than the case at bar: and in the same case, if the lord granted over his seigniory, or if the feoffor died, there the privity, as to avowry, is destroyed; for it is personal, and holds only between the lord himself and the feoffee himself: so, if after the assignment of the lease, the lessor grants over his reversion, the grantee shall not have an action of debt against the lessee, for the privity of contract, as to the action of debt, holds only betwixt the lessor himself and the lessee himself: so in such case, if the lessee dies, the lessor shall not have an action of debt against his executors; for the privity consists only between the lessor and the lessee. See for the case of avowry, Litt. Chap. Releases, 106, 107; 4 E. 3, 22; 2 E. 4, 6; 34 H. 6, 46; 37 H. 6, 33; 7 E. 4, 28; 24 H. 8, Dy. 4; 29 H. 8, tit. Avow. Br. 111.

So if tenant in dower, or tenant by the curtesy, grants over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment: but if the heir grants over the reversion, then the privity of the action is destroyed, and the grantee cannot have any action of waste, but only against the assignee; for between them is privity in estate, and between the grantee and the tenant in dower, or tenant by the curtesy, is no privity at all. See F. N. B. 56, f. *temp.* E. 1, *Waste*, 122; 18 E. 3, 3; 30 E. 3, 16; 36 or 38 E. 3, 23; 11 H. 4, 18. And it was agreed, that if the lessor enters for condition broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the arrearages due before the condition broken, or the surrender made, as it appears by F. N. B. 120; 30 E. 3, 7; 6 H. 7, 3 b; F. N. B. 122 (against the book of 32 E. 3 Bar. 262, which is not law), and that in respect of the contract between the lessor and the lessee. Note, reader, so great was the authority and consequence of this judgment, that after this time, not only the point adjudged hath been always affirmed, but also all the differences in this case taken by WRAY, C. J., and the court have been adjudged, as you may learn by the cases following Hil. 36 Eliz. in the K.'s B. Rot. 420, between *Ungle* and *Glover* it was adjudged, that if the lessee for years assigns over his interest and the lessor by deed indented and enrolled according to the Statute, bargains and sells the reversion to another, that the bargainee shall not have an action of debt against the lessee, for there is no privity betwixt them.¹ But it was unanimously agreed by POPHAM, Chief Justice, CLENCH, GAWDY,

¹ But see *Howland v. Coffin*, *post*, p. 284.

and FENNER, Justices, that after the assignment the lessor himself might have an action of debt against the lessee for rent due after the assignment.¹ Trin. 37 Eliz. in the King's Bench, Rot. 1042, between *Overton* and *Sydhall*, two points were resolved by POPHAM, C. J., and the whole court.

1. That if the executor of a lessee for years assigns over his interest, that an action of debt doth not lie against him for rent due after the assignment.

2. If the lessee for years assigns over his interest, and dies, the executor shall not be charged for rent due after his death; for, by the death of the lessee, the personal privity of contract, as to the action of debt in both cases, was determined. And Mich. 40 & 41 Eliz. between *George Brome, Esq.*, plaintiff, and *Hore*, defendant, the case in effect was such: A. leased to C. 3 acres of land for years rendering rent, the said C. assigned all his estate in one acre to another, A. suffered a common recovery to the use of B. in fee, who brought an action of debt against the first lessee, and it was adjudged by POPHAM, C. J., and the whole court, that the action did lie; for inasmuch as the lessee had assigned his interest but in part, and remained possessed of the residue, that not only the lessor, but also his assignee, or he who claimeth under him shall have an action of debt for the whole rent against the lessee, for there was not privity of contract only, but also privity in estate and contract together; and therefore the action in this case shall go with the estate; as at common law, if before the Statute of *Quia Emptores terrarum* the tenant had made a feoffment in fee of part of the tenancy, there was not any apportionment, but the lord, or his grantee, should avow on the feoffor for as much as he remained tenant in respect of the residue: but if he had made a feoffment of the whole, then the grantee of the lord should not avow on him, as it hath been said before. See 22 Ass. 52; 24 H. 8, 4 b; 32 H. 8, Br. Accept. for this matter. And POPHAM, C. J., in this case said, that in case when rent reserved on a lease for years shall be apportioned, if in an action of debt the lessor demands more *quam oportet*; yet on *nihil debet* the lessor shall recover as much as shall be apportioned and assessed by the jury, and shall be barred for the residue. And Pasch. 41 Eliz. Rot. 2485, in the Common Pleas, *Samuel Marrow* brought an action of debt against *Francis Turpin* and *W. Turpin*, administrators of *Geo. Turpin*, and declared on a demise made by the plaintiff by deed indented of certain land to the intestate for years rendering rent, and for rent behind after the death of the intestate, the action was brought; the defendants pleaded, that before the rent behind, one of the defendants had assigned all his interest to Thomas Boorde, of which assignment the plaintiff had notice, and accepted the rent by the hands of the assignee, due at

¹ And see *Hazelton v. Chaffin*, 197 Pac. (Kan.) 870, 871; *Kanawha-Gauley Coal Co. v. Sharp*, 73 W. Va. 427, 430; 52 L. R. A. N. S. 968 note.

a day after the assignment, and before the day on which the rent was due which is now demanded, upon which the plaintiff did demur. And it was adjudged against the plaintiff, because the privity of the contract, as to the action of debt, was determined by the death of the lessee; and therefore, after assignment made by the administrator, debt did not lie against the administrator for rent due after the assignment, according to the judgment given in *Overton and Sydhall's Case* before.

Also it was said, if the lessee assigns over his term, the lessor may charge the lessee or his assignee at his election;¹ and therefore if the lessor accepts the rent of the assignee, he hath determined his election, and shall not have an action against the lessee afterwards for rent due after the assignment,² no more than if the lord once accepts the rent of the feoffee, he shall not avow on the feoffor; and by these judgments and resolutions you will the better understand your books; betwixt which *prima facie* seems to be some diversity of opinions. *Vide* 44 E. 3, 5, & 44 Ass. 18; 9 H. 6, 52, by Paston, which agree with the judgment of Sir Christopher Wray. See 8 Eliz. Dyer, 247, and the *quære* there made is now well resolved.

HOWLAND ET AL. v. COFFIN

12 Pick. (Mass.) 125. 1831.

THIS was an action of debt for rent from June 3, 1823, to December 3, 1824; and from June 3, 1825, to December 3, 1829, at \$75 a year.

It was agreed that the premises for which the rent was claimed, were, on May 6, 1822, the property of Uriah Brownell, who, on that day, by an instrument under seal, demised the same to one John Randolph for the term of twelve years from that date, Randolph yielding rent therefor at the rate of \$75 a year, payable semi-annually. The defendant purchased all the right which Randolph had in the premises, and afterwards the plaintiffs purchased all the right which Brownell had therein.

If the defendant was bound to pay the amount of rent reserved in the indenture of lease, he was to be defaulted and damages to be assessed accordingly; but if he had a right to show that the

¹ Lessor may sue assignee of lessee in debt, *McKeon v. Whitney*, 3 Den. (N. Y.) 452.

² *Marsh v. Brace*, Cro. Jas. 334, *accord*. See *Harmony Lodge v. White*, 30 Ohio St. 569. Compare *Manley v. Dupuy*, 2 Whart. (Pa.) 162; *Adams v. Burke*, 21 R. I. 126, *post*, p. 389; 52 L. R. A. N. S. 973 note.

Whether an assignee of a lease is liable for rent accruing after he has reassigned the premises, see *Johnson v. Sherman*, 15 Cal. 287; *Hartman v. Thompson*, 104 Md. 389; *Harmon Co. v. Star Brewing Co.*, 232 Mass. 566; *Meyer v. Alliance Co.*, 86 N. J. L. 694, affirming 84 N. J. L. 450; *Durand v. Curtis*, 57 N. Y. 7.

premises were not of that annual value, a new trial was to be granted and damages to be assessed by the jury.

WILDE J. delivered the opinion of the Court. We entertain no doubt, notwithstanding the dictum in *Walker's case*, 3 Co. Rep. 22, that this action is well maintained. The only point of defence now made was recently decided by this Court in an action between the same parties, and we have heard nothing since to change the opinion we then formed. The action is founded on a privity of estate between the parties. The defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of rent ran with the land and by the assignment of the term became binding on the defendant. So by the assignment of the reversion the plaintiffs became entitled to all the rights of the lessor. It is said in note 6, 1 Wms's Saund. 241, that at common law an action of debt lay for the assignee of the reversion, for the recovery of rent, which is incident to the reversion. And if this were not so at common law, it is clearly so by the statute of 32 Hen. 8, c. 34, which seems to have been overlooked in *Walker's case*. The law there laid down on the point in question, is not supported by the subsequent authorities, and cannot be sustained on principle or any reasonable construction of the statute. *Walker's case*, though decided right as to the question on which the case turned, has since been questioned as to other points not now under consideration, and which therefore it is not necessary now to discuss. *Vide* Hammond on Parties to Actions, 116 to 133.

According to the agreement of the parties, the defendant is to be defaulted.¹

¹ See *Collins v. Pratt*, 181 Mass. 345; *Taylor v. Kennedy*, 228 Mass. 390; *Reidy v. Kennedy*, 233 Mass. 514.

In *Thursby v. Plant*, 1 Lev. 259, a lessee who covenanted to pay rent was held liable in covenant to the assignee of the lessor. And in debt in *Outtoun v. Dulin*, 72 Md. 536. Compare *English v. Key*, 39 Ala. 113; *Damren v. American Power Co.*, 91 Me. 334, 337.

"Where a lessee for a term of years parts with his whole term to a third party, it is called an assignment, and the assignee thereby becomes the tenant of the original lessor and subject to all the covenants in the lease, which run with the land, just as the lessee was. The privity of estate and privity of contract still subsist between the lessor and assignee, as it did between the lessor and lessee. Taylor's Landlord and Tenant, §§ 436-37. But when a tenant makes a lease for a less number of years than his own term, it is not an assignment, but is called an underlease; and it is well settled that as between the original lessor and the undertenant there is neither privity of estate nor contract, so that between these parties no advantage can be taken of the covenants in the lease, and therefore the lessor can not sue an undertenant upon the lessee's covenant to pay rent, nor can he maintain an action for use and occupation against the undertenant unless under an agreement, as the relation of landlord and tenant does not subsist between them. *Holford v. Hatch*, Doug. 183; *Crusoe v. Bugby*, 3 Wils., 234; *Strange* 405; *Style*, 483; Taylor's L. & T., §§ 108, 448, and note,

WINNISIMMET TRUST CO. v. LIBBY ET AL.

232 Mass. 491. 1919.

CONTRACT for rent alleged to be due to the plaintiff upon December 2, 1916, and January 2 and February 2, 1917, as assignee of the rent from the lessor of premises known as the "Dream Theatre" in that part of Saugus known as Cliftondale, of which the defendants were lessees. Writ in the Municipal Court of the City of Boston dated February 10, 1917.

At the trial in the Municipal Court it appeared that on March 2, 1916, the original owner of the premises, James S. Duval, let the premises by an instrument in writing to the defendants for the term of three years; that on April 27, 1916, Duval executed and delivered to the plaintiff an assignment under seal of rents to fall due under the lease (excepting the rent for the last three months) as security for a debt; that on October 16, 1916, Duval conveyed the premises by quitclaim deed to one George W. Green; that this deed was recorded on October 17, 1916; that Duval did not notify the defendants or Green of the assignment to the plaintiff; that on November 1, 1916, Green, and on November 2, 1916, Duval, by notices in writing directed the defendants to pay rent to Green, the purchaser; that on November 28, 1916, for the first time, the plaintiff notified the defendants of its assignment and requested payment of rents described therein to it, and that the defendants paid to Green the rent falling due on November 2 and December 2, 1916, and January 2, 1917.

By various requests for rulings which were refused by the judge, the defendants raised the question stated in the opinion. The judge found for the plaintiff in the sum of \$153.75 and, at the request of the defendants, reported the case to the Appellate Division. The report was dismissed, and the defendants appealed.

PIERCE, J. This is an action of contract brought to recover certain rents reserved under a written lease given by the plaintiff's assignor to the defendants. The defendants' requests for rulings raise the question whether an assignment under seal, of rent to become due under a written lease for a term less than seven years after notice to the lessee, is effectual as against a subsequent purchaser of the lessor's reversion without notice of the prior assignment.

When rent is reserved, it is incident, though not inseparably so, to the reversion. Co. Litt. 143 a, 151 b. The rent may be granted away reserving the reversion; and the reversion may be granted away reserving the rent by special words.¹ By a general grant

Com., Dig., cov. (e. 3.) *Kennedy v. Cope*, Doug. 56."—Per BYNUM, J., in *Krider v. Ramsay*, 79 N. C. 354, 357. See *Girard Trust Co. v. Cosgrove*, 113 Atl. (Pa.) 741; 1 Tiffany, Landl. and Ten., § 151.

¹ See *Crosby v. Loop*, 13 Ill. 625; *Brownson v. Roy*, 133 Mich. 617; *Moffat v. Smith*, 4 N. Y. 126.

of the reversion the rent will pass with it as an incident to it; but by a general grant of the rent the reversion will not pass. *Demarest v. Willard*, 8 Cowen, 206. *Burden v. Thayer*, 3 Met. 76. *Beal v. Boston Car Spring Co.* 125 Mass. 157.

Rent, that is the right to recover future instalments of rent as they become due under the lessee's covenant to pay rent in the future, is not a chose in action, but is an incorporeal interest in land which can be assigned only by an instrument under seal. When assigned, the assignee holds the interest in his own right and may sue for it in his own name. *Patten v. Deshon*, 1 Gray, 325, 327. *Bridgham v. Tileston*, 5 Allen, 371.

In this Commonwealth a lease for less than seven years from the making thereof is valid against *bona fide* purchasers without actual notice. R. L. c. 127, § 4. *Toupin v. Peabody*, 162 Mass. 473, 477. A like exemption from the operation of the recording acts necessarily attaches to that incorporeal interest in real estate denominated rent when severed from the reversion to which it is an incident. A similar rule is applied to existing unrecorded easements. *Shaughnessey v. Leary*, 162 Mass. 108, 112.

The request of the defendants for a ruling that "A deed of the leased premises, accompanied by a written direction from the lessor to the lessees to make the payments due under the lease to the new owner, gives the new owner rights which are superior to an assignee of the rents where no notice of the assignment is given, either to the lessee or to the grantee of the premises until after the deed of the premises has been delivered," could not have been given, because the lessor was not the owner of the rent when he directed the lessee to make payment of the rents to the purchaser of the reversion, and because a man cannot grant nor charge that which he has not. *Jones v. Richardson*, 10 Met. 481. *Moody v. Wright*, 13 Met. 17. *Codman v. Freeman*, 3 Cush. 306. The assignment of rent is governed by the rule of *caveat emptor*. *Stone v. Patterson*, 19 Pick. 476. *Taylor v. Kennedy*, 228 Mass. 390, relied on by the defendants, does not support their contention, because in that case the plaintiffs claimed to recover in their own name the rent "under a contemporaneous parol agreement . . . that the plaintiffs should collect the rent for the remainder of the term and pay it to the grantee." It is plain that that action could not be maintained by the plaintiff as assignee of the rent or under an equitable assignment of the right to collect rent. *Bridgham v. Tileston*, *supra*.

It follows that the order of the Municipal Court, "Report dismissed," is affirmed. So ordered.¹

¹ A lessee for years who has assigned his whole term rendering rent may recover in an action of debt rent from such assignee. *Newcomb v. Harvey*, Carth. 161. See *Patten v. Deshon*, 1 Gray (Mass.) 325; *Williams v. Hayward*, 1 E. & E. 1040.

HORN v. BEARD

[1912] 3 K. B. 181. 1912.

APPEAL from the Westminster County Court.

The facts are stated at length in the judgment of the Court delivered by LUSH J. The following is a short statement sufficient to indicate the point decided.

The defendant was tenant of a flat in Jermyn Street for a term of three years from Midsummer, 1908, at a yearly rent of 160*l.* His lessors were Messrs. Adams and Biggs, who were the freeholders. The defendant regularly paid his rent to a firm of solicitors, Messrs. Le Brasseur & Oakley, who acted as agents for Adams and Biggs, the lessors. Adams and Biggs mortgaged their reversion to the Yorkshire Penny Bank, who went into possession and made a lease for twenty-one years to the plaintiff to take effect in præsentî.

The defendant knew nothing of the mortgage to the bank or of the lease by the bank to the plaintiff. When the defendant took his lease the plaintiff was manager of the flats and was known to the defendant in that and in no other capacity. When the plaintiff became lessee to the Yorkshire Penny Bank, Le Brasseur & Oakley acted as agents for him and continued to receive the rent paid by the defendant.

In October, 1910, certain building operations were being carried on in adjoining premises. The defendant complained that they constituted a nuisance and made his flat uninhabitable. He wrote to Messrs. Le Brasseur & Oakley saying that he would not pay the rent due on December 25, 1910.

In November, 1910, the plaintiff offered to pay the defendant 40*l.*, 20*l.* down and 20*l.* at the end of the defendant's lease, for the right to let the flat if he could find another tenant. The defendant, supposing, as he said, that the plaintiff was still acting as manager of the flats, accepted the offer.

Soon after Midsummer, 1911, when his lease terminated, the defendant claimed the 20*l.* payable under the agreement. The plaintiff then brought an action in the county court for 40*l.*, being rent for the quarter ending December 25, 1910, which had not been paid, and giving credit for the 20*l.* due under the agreement. The defendant denied that the plaintiff was his landlord and on that footing counter-claimed for that 20*l.* In that alternative, if it should be held that the plaintiff was his landlord, he claimed damages for eviction and disturbance.

The county court judge gave judgment for the plaintiff on the claim and counter-claim. As to the claim he held that there had been an attornment by the defendant to the plaintiff and that the rent was therefore due. As to the counter-claim he held on the facts that the agreement of November, 1910, by the plaintiff to pay the 40*l.*

was partly in consideration of the inconvenience which the defendant had suffered through the building operations.

The defendant appealed.

As appears from the judgment below, the Court, differing from the county court judge, held that there was no evidence of any attornment by the defendant to the plaintiff. As to the counterclaim they found no evidence that the agreement of November, 1910, had any reference to the disturbance or eviction of the defendant.

The only point of law argued was whether in order to entitle the plaintiff to recover the rent due on December 25, 1910, an attornment by the defendant was necessary.

LUSH J.¹ On these facts the plaintiff contended before the learned county court judge that the defendant had attorned and become his tenant. This the defendant denied. The learned judge held that the defendant had negotiated with the plaintiff as his landlord in respect of the building operations, and that the correspondence with the plaintiff as his landlord amounted to an attornment entitling the plaintiff to sue for the rent. We do not think that on the correspondence there is any sufficient evidence of an attornment. It appears to us that the correspondence shews the contrary. The defendant more than once asked for information as to what the plaintiff's interest in the premises was, and never could obtain an answer until after the tenancy had come to an end, and the plaintiff, in our opinion, failed to establish an attornment.

Before us, however, Mr. Carthew, on behalf of the plaintiff, contended that by reason of the statute 4 & 5 Ann. c. 3² no attornment was necessary. He contended that the lease from the mortgagees to the plaintiff was the grant of a reversion within the meaning of the statute, and that therefore the necessity of an attornment was dispensed with. We are of opinion that this contention is well founded. The statute says that "all grants or conveyances thereafter to be made by fine or otherwise of any manors or rents or of the reversion or remainder of any messuages or lands shall be good and effectual to all intents and purposes without any attornment of the tenants . . . as if their attornment had been had and made." It is not possible now, having regard to the authorities, to contend that a lease for years is not the grant of a reversion expectant on the determination of an existing shorter term if the lease is made to take effect *in præsentia*. In Platt on Leases, vol. 2, pp. 57 and 58, the following passage occurs: "When, during a

¹ The court's statement of the facts and its opinion on the counterclaim are omitted.

² Stat. 4 & 5 Anne, c. 3 (c. 16 in the common printed editions), § 9. Section 10 is as follows: "Provided nevertheless, That no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee."

subsisting lease, a second lease is made, to commence immediately, for a longer term than the unexpired estate under the former, it is concurrent with the former in point of interest and computation of time, and operates as an immediate lease of the reversion. Before the statute of Anne (4 & 5 Anne, chapter 3), section 9, such a lease, unaccompanied by attornment, would have operated as a grant of a future interest in reversion, conferring an *interesse termini* only, the reversion remaining in the grantor; but if the first lessee attorned, a reversion in respect of that lease would have passed, conferring on the grantee a right to the rent payable by such first lessee; and it is apprehended that such second lease would now, in general, pass a reversion, together with a right to the rent under the former lease, without attornment, that ceremony having been rendered unnecessary by the statute referred to." In the case of *Birch v. Wright*, (1786) 1 T. R. 378, at p. 384, Buller, J. says: "The statute enacts, that all grants or conveyances thereafter to be made by fine or otherwise, of any manors, rents, reversions, or remainders, shall be good and effectual to all intents and purposes, without any attornment of their tenants, as if their attornment had been made. This clause comprehends all grants and conveyances, and therefore whether it be a grant by way of mortgage, or of the fee simple, or only of the reversion for a term of years, as in the present case, it makes no difference. And the effect of the clause is, that it creates an immediate privity between the grantee and the tenant." See also the summing up of Parke B. in *Harmer v. Bean*, (1853) 3 Car. & K. 307, and the case that was cited to us of *Wright v. Burroughes*, 3 C. B. 685. Sir W. Page Wood V.-C. appears to have held the contrary in *Edwards v. Wickwar*, L. R. 1 Eq. 403, but in a note to the report of the same case in the *Law Journal*, 35 L. J. (Ch.) 309, it is pointed out that the statute was not cited in the argument in that case, so that the decision is not really a decision to the contrary. That being so, the plaintiff established his right to maintain the action.

With regard to the counter-claim, however, the learned county court judge held that the 40*l.* was paid by the plaintiff to the defendant as a solatium for his loss of the use of the flat during the quarter in question. In our opinion there was no evidence to support this finding.

*Appeal allowed.*¹

¹ *McDonald v. Hanlon*, 79 Cal. 442; *Benjamin v. Northwestern Fire Ins. Co.*, 119 Minn. 27; *Hendrickson v. Beeson*, 21 Neb. 61; *Harmer v. Bean*, 3 C. & K. 307, *accord*.

Compare *Logan v. Green*, 4 Ired. Eq. (N. C.) 370; *Hughes v. Robotham*, Cro. Eliz. 302, *post*, p. 371; *Doe d. Rawlings v. Walker*, 5 B. & C. 111.

LEWIS v. BAKER

[1905] 1 Ch. 46. 1904.

WITNESS ACTION.

This was an action for wrongful distress.

On June 30, 1902, the defendant Baker took an assignment of a forty years' lease of 232, Great Portland Street, the term expiring on July 6, 1904.

By an agreement under hand dated May 6, 1902, the reversioner in fee agreed to grant Baker a reversionary lease of the same premises for seventy-three years from July 6, 1904, the expiration of the original lease.

By an agreement under hand dated October 20, 1903, Baker agreed to let the premises to the defendant Haddon for twenty-one years from September 29, 1903, at a rent of 300*l.*, and Haddon thereupon entered into possession. The agreement provided for the execution of a formal lease containing certain covenants and conditions, and also provided that until the execution of the lease the premises should be held by the tenant at the rent aforesaid and subject to the said covenants and conditions. No express right of distress was given.

The plaintiff occupied the upper part of the premises as tenant to Haddon.

On February 19, 1904, Baker distrained the plaintiff's goods for 57*l.* rent due from Haddon at Christmas from the time he took possession.

The plaintiff, who denied Baker's right to distrain on the ground that he had no reversion, claimed damages against the defendants, Baker, Haddon, and the bailiff, for the wrongful distress.

On a motion for an interlocutory injunction it was arranged that the distress should be withdrawn on payment of 55*l.* into court, and 6*l.* 10*s.* the costs of the levy to the bailiff.

The case against Haddon was abandoned, and he did not appear at the trial.

Cur. adv. vult.

SWINFEN EADY J. (after stating the facts.) It was argued that Baker had no right of distress, as that right depends on the existence of a reversion in the lessor, and Baker had no such reversion; that the demise to Haddon was for a longer period than the unexpired residue of the original lease, and, therefore, amounted to an assignment of that term, and that under the agreement of May 6, 1902, for the grant of a reversionary lease, Baker had only an *interesse termini* and no estate in the land. It was contended that there was not any merger of the interests held by Baker.

Where a person parts with all his estate in land, as where he purports to demise for a period co-extensive with his own interest, or

longer, the transaction is in law an assignment, although purporting to be a demise; an underlease for the whole of the residue of a term is in law an assignment. In Brooke's Abridgment, tit. "Dette," pl. 39, the following proposition is laid down: "If a man hath a term for years, and grants all his estate of the term, rendering rent, he cannot distrain."

In *Parmenter v. Webber*, 8 Taunt. 593; 20 R. R. 575, the defendant agreed to let two farms to the plaintiff during the residue of the defendant's leases of the same, the plaintiff paying rent half-yearly, at Lady Day and Michaelmas; the plaintiff entered into possession of the farms, and paid rent for a year, but the subsequent rent being in arrear the defendant distrained. It was held by the Court of Common Pleas that the agreement between the plaintiff and defendant amounted in law to an assignment of the defendant's estate, and, although there was a rent reserved upon the face of the instrument, the defendant could not legally distrain, as there was no reversion left in him.

Again, in *Preece v. Corrie*, 5 Bing. 24; 30 R. R. 536, the facts were that Thomas White held certain premises for the residue of a term of years which would expire on November 11, 1826, and on September 11, 1826, he let the premises to the plaintiff to hold until November 11, 1826, rendering immediately 270*l.* for rent. This not being paid, the defendant, as the bailiff of Thomas White, distrained, and the plaintiff brought replevin. The Court of Common Pleas held that the distress was illegal, White having no reversionary interest expectant on the term, although an action for debt or assumpsit for the rent reserved might have been maintained.

In my opinion the defendant Baker, having parted with all his estate in the term created by the original lease, had no right to distrain. It was contended that Haddon, as tenant, was estopped from disputing his landlord's title, and that the plaintiff, being a sub-tenant of Haddon, was in the same position. It is not, however, a case of disputing title, but of denying the right of the landlord to pursue the summary remedy by distress, and both of the cases to which I have referred shew that even as between the two parties to such a transaction there is no estoppel precluding the lessee from questioning the legal right to distrain.

It was further urged that, having regard to the agreement to grant the reversionary lease and to the case of *Walsh v. Lonsdale*, 21 Ch. D. 9, the defendant Baker must be treated as having on October 20, 1903, a term of years expiring on July 6, 1977, and, therefore that he had in fact the reversion expectant on the term agreed to be granted to Haddon. This contention is not well founded. Assuming that the reversionary lease had been actually granted, it would not have conveyed any estate to Baker, but he would only have had an *interesse termini* until entry on or after the date as from which he was entitled to enter into possession under it. *Smith v. Day*, 2 M. & W. 684, 46 R. R. 747, is a clear authority on this

point. There the ground landlord had granted to an undertenant a reversionary lease to commence as from a future date, which was the date of the expiration of the original lease, and it was held that he still had the reversion expectant on the original lease, and was entitled to distrain for rent due under it, and that where a lease is granted to commence from a future date the lessee has thereunder no estate whatever, which remains in the lessor, but a mere *interesse termini* until after entry under the lease when the date for its commencement has arrived. At p. 695 Parke B. said: "The second lease to commence in futuro was a mere *interesse termini*. The reversion continued in the lessor till the determination of the first term." And, again, on p. 699: "The second lessee has no interest whatever till the determination of the first lease, except a mere *interesse termini*. It is clear that no reversion could pass by that deed, since it is a mere interest *in futuro*."

The nature of an *interesse termini* was very fully considered in *Doe v. Walker*, 5 B. & C. 111, 118; 29 R. R. 184. It was there pointed out that such an interest merely gives a right to have the possession at a future time. It is a right, not an estate. The whole estate notwithstanding that right is in the lessor. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate. It has all the properties and consequences of a right only, not of an estate. See also *Beardman v. Wilson*, L. R. 4 C. P. 57; *Hyde v. Warden*, 3 Ex. D. 72, 83.

As therefore the reversionary lease, if granted, would not have conveyed any estate to Baker, he cannot rely upon the agreement to grant it as giving him any reversion. On the expiration or sooner determination of the original lease, the freeholder would have had a right of entry. This point is well illustrated by the case of *Joyner v. Weeks*, [1891] 2 Q. B. 31, 47. It was an action for breach of a covenant by a lessee to deliver up the demised premises in repair at the expiration of the lease. Some two years before the expiration of the lease, the lessors had granted to a third person a reversionary lease of the same premises at an increased rent, and it was urged that the lessors had therefore sustained no damage by the breach of covenant. The Court of Appeal held that the measure of damages for the breach was not affected by the fact that by reason of the reversionary lease having been granted the lessor was no worse off at the time of action brought than he would have been if the covenant had been performed. Fry L. J. said: "The second lease passed no estate until possession was taken under it. It only gave an *interesse termini* which would, on possession being taken, become an estate. The lessor had a right of entry on the determination of the first lease. Directly that happened a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease."

The defendant Baker also relied on s. 44 of the Conveyancing and Law of Property Act, 1881; but that does not appear to me to have any application to the present case. Upon these grounds I am of opinion that at the date of the distress the defendant Baker had not any reversion in the premises, and therefore had not any right of distress as incident thereto; and I decide in favor of the plaintiff that the distress was illegal. The plaintiff is, therefore, entitled to recover against the defendants Baker and the bailiff, and I assess the damages at 50*l.* The plaintiff will have the costs of the action against these defendants. Judgment will be in favor of the defendant Haddon but without costs, as he did not appear to ask for them.

The 55*l.* in court will be paid out to the plaintiff, but the 6*l.* 10*s.* paid to the bailiff will not be repaid, as I have included that in assessing the damages.¹

ARDS v. WATKIN

Cro. Eliza. 637, 651. 1588, 1599.

UPON demurrer the case was, lessee for thirty years of a parcel of land called Shortwood, lets it for twenty-eight years, rendering £34 rent *per annum*, and after deviseth £28 parcel of that rent to his three sons, severally to every of them a third part. One of them brings debt for his part of the rent: and, Whether this action lay or not? was the question. — It was argued by *Rydgley* for the plaintiff, and by *Nichols* for the defendant. GAWDY and FENNER held, that the action well lay; for there is no doubt but that rent may be devised, and be divided from the reversion; for it is not merely a thing in action, but *quasi* an inheritance, as *Knowles' Case*, Dyer, 5 b, is; and in 24 Hen. 8, *Rysden's Case*, Dyer, 4 b. If lessee grants over all his term in part of the land, yet it is chargeable in an action with the entire rent; for he by his act cannot apportion it. And by the grant of part the lessee is not compellable to attorn; for then he should be liable to two actions, or two distresses. But the devise is *quasi* an act of law, which shall inure without attornment, and shall make a sufficient privity, and so it may be well apportioned by this means. Wherefore, &c. — POPHAM and CLENCH, *e contra*. For as the lessee by his own act shall not divide the lessor's contract, nor apportion his action; so likewise the law favors the lessee, that the act of the lessor shall not charge him with divers actions, or double distresses, but upon his voluntary attornment; and the contract being entire cannot be apportioned. But POPHAM agreed, that the rent was well devisable, and by that means severable from the reversion. And although a thing in action cannot be trans-

¹ And see *Thomas v. Whightman*, 129 Ill. App. 305; *Eells v. Morse*, 208 N. Y. 103; *Smith v. Day*, 2 M. & W. 684; *Blatchford v. Cole*, 5 C. B. N. s. 514. Compare *Pendergast v. Young*, 21 N. H. 234.

ferred over, nor be devised; yet a contract, which ariseth from an interest in land, or which is an interest, may be well transferred over. Wherefore, &c. — *Adjournatur*.

The case was now moved again; and GAWDY and FENNER, and CLENCH agreeing with them, held that the devise was good, and well severable; for as to that objection, that a mischief may happen to the tenant, that he shall be subject to two actions and distresses, that is his own fault; for if he pays his rent, he shall avoid it: and the same mischief is, where he deviseth part of the reversion and rent, which is agreed on the other part to be well enough; and although a contract, or a thing in action, cannot be transferred nor divided, yet rent only may be. For it is a thing in possession; for he doth not grant the action, but the law gives it as incident to the rent. And *Huntley's Case*, 10 Eliz. Dyer, 326, is express, where a devise was of a reversion upon a lease for years, with the rent, to a man and his sister, and the heirs of their bodies; the sister dies without issue; the brother dies having issue; the heir had the moiety of the rent. — POPHAM *e contra*. For the difference will be, when part of a reversion and rent is granted, that is good; but when the rent is severed from the reversion, it is otherwise: for then it is but in nature of an annuity, which cannot be granted by parcels, but entirely; but an annuity or rent only are grantable over, because they are things of continuance, and are not personal. And the reason of *Huntley's Case* is, because the rent is divided with the reversion. But notwithstanding, in regard three of them agreed, he consented that judgment should be entered for the plaintiff. — NOTE. That in the argument of this case, a case was cited in this court, Easter Term, 28 Eliz. Roll. 344, where a devise was of an entire reversion and rent, which was void for a third part; because it was holden *in capite*, and debt was brought for two parts of the rent, and adjudged maintainable.¹

ST. 11 GEO. II. c. 19, § 14. And to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, be it further enacted by the authority aforesaid, That from and after the said twenty-fourth day of June, it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction from the lands, tenements, or hereditaments, held or occupied by the defendant or defendants, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in

¹ See 1 Tiffany, Landl. and Ten., pp. 1069, 1127, where actions by partial assignees of the reversion and actions against partial assignees of the leasehold are discussed. *Bancroft v. Vizard*, 202 Ala. 618; *Rosenberg v. Taft*, 111 Atl. (Vt.) 583, 586.

such action shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered.¹

¹ "The 'difficulties' here referred to would seem to be two. If, before this statute, the plaintiff counted upon a *quantum meruit*, and the evidence disclosed a demise for a sum certain, he would be non-suited for a variance. Secondly, if he declared for a sum certain, he must, as we have seen, prove an express promise at the time of the demise. The statute accomplished its purpose in both respects. But it is in the removal of the second of the difficulties mentioned that we find its chief significance. Thereby *indebitatus assumpsit* became concurrent with debt upon all parol demises. In other words, the statute gave to the landlord, in 1738, what Slade's case gave to the seller of goods, the lender of money, or the employee, in 1602; namely, the right to sue in assumpsit as well as in debt, without proof of an independent express promise.

"The other counts in *indebitatus assumpsit* being the creation of the courts, the judges found no great difficulty in gradually enlarging their scope, so as to include quasi-contracts, where the promise declared upon was a pure fiction. Thus, one who took another's money, by fraud or trespass, was liable upon a count for money had and received, *Thomas v. Whip*, Bull. N. P. 130; *Tryon v. Baker*, 7 Lans. 511, 514; one who wrongfully compelled the plaintiff's servant to labor for him, was chargeable in assumpsit for work and labor, *Stockell v. Watkins*, 2 Gill & J. 326; and one who converted the plaintiff's goods, must pay their value in an action for goods sold and delivered.

"But, *indebitatus assumpsit* for rent being of statutory origin, the courts could not, without too palpable a usurpation, extend the count to cases not within the act of Parliament. The statute was plainly confined to cases where, by mutual agreement, the occupier of land was to pay either a defined or a reasonable compensation to the owner. Hence the impossibility of charging a trespasser in assumpsit for use and occupation." Ames, Lectures on Legal History, pp. 170-171. See *Gibson v. Kirk*, 1 Q. B. 850.

Occasionally Stat. 11 Geo. II, c. 19 § 14 is regarded as in force in this country. *Kline v. Jacobs*, 68 Pa. 57.

Similar statutes have been enacted in some states. See 2 Tiffany, Landl. and Ten., p. 1856.

In others it has been said that the action for use and occupation of real estate exists independently of statute. *Gunn v. Scovil*, 4 Day (Conn.) 228; *Lockwood v. Lockwood*, 22 Conn. 425; *Crouch v. Briles*, 7 J. J. Marsh. (Ky.) 255; *Gould v. Thompson*, 4 Met. (Mass.) 224; *Dwight v. Cutler*, 3 Mich. 566; *Hoggsett v. Ellis*, 17 Mich. 351; *Eppes v. Cole*, 4 Hen. & M. (Va.) 161. But see *Long v. Bonner*, 11 Ired. Law (N. C.) 27.

As to the liability for use and occupation of a purchaser of land who enters under a contract before the conveyance is executed, see *Carpenter v. United States*, 17 Wall. (U. S.) 489; *Gould v. Thompson*, 4 Met. (Mass.) 224; *Winterbottom v. Ingham*, 7 Q. B. 611.

"Assumpsit for rent. No express promise is shown, and the law does not imply one from the facts. The defendant was tenant of the plaintiff's father. He died, and the tenant denies the title of the plaintiff, who claims to hold as heir. As to him, the tenant has become a disseizor. There was no relation of landlord and tenant between them from which the law implies assumpsit for rent or use and occupation. *Rogers v. Libbey*, 35 Maine, 200; *Howe v. Russell*, 41 Maine, 446; *Emery v. Emery*, 87 Maine, 281. Title to land should not be tried in assumpsit"—Opinion of the Court in *Burdin v. Ordway*, 88 Me. 374.

That a trespasser to real estate is not liable in assumpsit for use and

NEWMAN v. ANDERTON

2 B. & P. N. S. 224. 1806.

REPLEVIN. The plaintiff in his declaration complained that the defendant took certain goods and chattels of the plaintiff in a bedroom and shop, and unjustly detained them, against sureties and pledges. The defendant avowed the taking in the bedroom, because "the plaintiff, for the space of sixteen weeks and more next before, and ending, &c., enjoyed the said bedroom in which, &c., together with a certain other room and apartment, also being in and part and parcel of the said dwelling-house in the declaration mentioned, with certain furniture and effects with which the said bedroom in which, &c., and the other said room and apartment, with the appurtenants, were furnished under a demise thereof theretofore made by the defendant to the plaintiff, at the weekly rent of 13s. of lawful money of Great Britain payable weekly on the Thursday in every week, and during all that time held the same of the defendant by virtue of the said demise, as his tenant thereof." And because £12 were in arrear, avowed the taking and prayed a return.

The plaintiff took judgment for so much as related to the shop; and as to the avowry, pleaded that he did not hold the said bedroom together with the said other room and apartment in the said declaration mentioned, and certain furniture and effects with which the said other room and apartment were furnished under a demise thereof theretofore made by the defendant to the plaintiff, at the weekly rent of 13s. payable on the Thursday in every week in manner and form, &c.

On this plea issue was joined.

At the trial before *Sir James Mansfield*, C. J., at the Westminster Sittings after last Hilary Term, a verdict was found for the defendant.

A rule having been obtained, calling upon the defendant to show cause why this verdict should not be set aside, upon the ground that the defendant could not be entitled to distrain for the rent of ready furnished lodgings.

SIR JAMES MANSFIELD, C. J. Cases like this must have very often occurred, and yet it does not appear that the right of distress has ever before been called in question. The difficulty of the case consists in this, that in London and other towns it scarcely ever happens that any house is let without some goods being let with it,

occupation, see *Lloyd v. Hough*, 1 How. (U. S.), 153, 159; *Hurley v. Lamoureux*, 29 Minn. 138; *Cathcart v. Matthews*, 105 S. C. 329. Compare *Watson v. United States*, 263 F. R. 700; *Jones v. Donnelly*, 231 Mass. 213; *Cavanaugh v. Cook*, 38 R. I. 25; *Roukous v. DeGraft*, 99 Atl. (R. I.) 821; *Phillips v. Homfray*, 24 Ch. D. 439; 23 Central L. J. 387.

and yet one rent is always reserved. In the case of a brewhouse it is common to let the utensils with it, and yet I never heard it doubted that the landlord might distrain for rent. Whether the goods be worth five shillings or five hundred pounds, the case must be the same. We will inquire into the matter, and give our opinion in a few days.

Cur. adv. vult.

On this day SIR JAMES MANSFIELD, C. J., said: Upon this question no authorities have been cited either on the one side or the other. But it must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods; for rent cannot issue out of goods. In *Spencer's Case*, 5 Co. 17, it is resolved that if a man lease sheep or other stock of cattle, or any other personal goods, for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee; for it is but a personal contract; and it is added "the same law, if a man demises a house and land for years with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only." The material words in that resolution are those which declare that where land is leased with stock upon it, the rent still continues to issue out of the land only. In that case, therefore, as well as any other, the person to whom the rent is due may distrain for the same; and consequently the landlord here, who was not paid his rent, has pursued his legal remedy of distress, though the rent issued out of ready furnished lodgings. *Rule discharged.*¹

NEWTON v. SPEARE LAUNDERING CO.

19 R. I. 546. 1896.

DEFENDANTS' petition for a new trial.

STINESS, J. The defendants hired of the Newport Laundry Co. a laundry plant, comprising both real and personal estate, May 14, 1894, at \$125 a month. The testimony shows that a lease was

¹ *Armstrong v. Cummings*, 58 How. Pr. (N. Y.) 331; *Stein v. Stely*, 32 S. W. (Tex. Civ. App.) 782; *Farewell v. Dickenson*, 6 B. & C. 251, accord. See *Lathrop v. Clewis*, 63 Ga. 282; *Mickle v. Miles*, 31 Pa. 20; *Vetter's Appeal*, 99 Pa. 52. Compare *Emott v. Cole*, Cro. Eliz. 255.

talked about and drawn up, but it was not signed by all of the lessors nor by the defendants, and the only defendant who testified denied that it was agreed to. The judge who tried the case treated the hiring as one from month to month, and we think he was correct.

The real estate was subject to a mortgage, under which it was sold at auction September 8, 1894; and the plaintiff, being the purchaser, brings this action to recover the rent due from September 14, 1894, to May 14, 1895, the time when he took possession of the property. Upon these facts the judge directed a verdict for the plaintiff for the amount claimed, and the defendants ask for a new trial upon exceptions to such ruling. We think that the direction was erroneous.

The defendants' agreement to pay \$125 per month was for the use of the real estate, together with the machinery and other personal property needed in the business. The testimony does not show an attornment by them to the plaintiff, nor an agreement with him as to the amount which he should receive for the real estate alone. According to the record and the ruling of the judge, the personal property remained the property of the Newport Laundry Co. after the foreclosure of the mortgage. Taking the case as it is presented, the most that the plaintiff can demand is what the use of the real estate was worth, distinct from what the use of the machinery was worth. The previous agreement, as an entirety, came to an end when the mortgage was foreclosed. It is for the jury to assess this sum according to the proof, as in ordinary cases, for use and occupation. *Buffum v. Deane*, 4 Gray, 385. The ruling of the court seems to have rested upon two points: First, that the defendants had acknowledged that they were liable at the rate of \$125 per month; and, second, that if Mr. Horgan, one of the original lessors, sat by and saw the plaintiff claim the rent, he could not collect it again.

As to the first point, it appears that the plaintiff did so state; but from his whole testimony it is clear that he meant only to say that they admitted that the rent was so much per month, but denied that they were liable to him, and some of these statements were in the course of an attempt to compromise. An admission that the rent was originally \$125 per month is not an admission that the defendants were liable to the plaintiff for that sum for the real estate alone.

As to the second point, whether the original lessors would be estopped or not by the plaintiff's recovery of the full amount then agreed upon, it is also clear that the plaintiff had no right, against the objection of the defendants, to recover more than the use of the land was worth, and that they had the right to have his judgment limited to that sum. The assessment of the plaintiff's claim should have been left to the jury, and therefore a new trial must be granted.

Another question is made, which should be disposed of for the purposes of another trial. The defendants claim to have abandoned the property February 14, 1895; to have sent the key to the plaintiff, and that they are not liable for the rent after that time. The plaintiff admits that the key was sent to his office, but he denies that he took any possession of the property until May 14, 1895. The judge correctly ruled that, if the defendants were tenants from month to month, they were liable for the rent until they terminated the tenancy by proper notice, or until a surrender and acceptance of the premises by the owner. Sending a key to the owner, without more, is not such a surrender and acceptance as will discharge a tenant's liability for rent. *Townsend v. Albers*, 3 E. D. Smith (N. Y.) 560; *Withers v. Larrabee*, 48 Me. 570; *Pier v. Carr*, 69 Pa. St. 326.¹

PAXTON v. KENNEDY

70 Miss. 865. 1893.

COOPER, J.,² delivered the opinion of the court.

The appellee, being indebted to appellant several hundred dollars, leased from him for a term of years a tract of land, at a fixed rent of one hundred dollars per annum, and, at the same time and by the same writing, promised to pay to appellant, in five equal annual payments, the sum of his past indebtedness *as rent*, and also agreed to execute his notes for the agreed rent and for the antecedent debt, the exact amount of which was not then known, by which notes the said debt was to be stipulated to be paid *as rent*. The appellee was let into possession of the leased premises, but refused to execute the notes stipulated for in his contract. The appellant sued out an attachment for rent, including in his demand the sum of one hundred dollars, and also one-fifth of the sum of the antecedent debt. The tenant brought replevin for the property seized, and the landlord avowed, justifying the distress. On the trial, the appellant offered to prove that at the expiration of the first year the appellee paid, under his contract and according to its terms, both

¹ Part of the case is omitted.

Buffum v. Deane, 4 Gray (Mass.) 385; *Salmon v. Matthews*, 8 M. & W. 827, *accord*. *Fay v. Holloran*, 35 Barb. (N. Y.) 295, *contra*. See *Whitaker v. Hawley*, 25 Kan. 674; *Newton v. Wilson*, 3 Hen. & M. (Va.) 470; *Le Tavener's Case*, Dyer 56 a; *Read v. Lawnse*, Dyer 212 b. Compare *Jordan v. Indianapolis Water Co.*, 159 Ind. 337; *Jones v. Smith*, 14 Ohio 606.

As to whether rent issues out of licenses or easements, see *Buszard v. Capel*, 8 B. & C. 141; *Williams v. Hayward*, 1 E. & E. 1040; *Hancock v. Austin*, 14 C. B. N. S. 634; *Selby v. Graves*, L. R. 3 C. P. 594. Compare *McMorran Milling Co. v. Little Co.*, 201 Mich. 301.

² Only the opinion is given.

the sum of one hundred dollars and one-fifth of the antecedent debt, which evidence, upon objection of the plaintiff, was excluded. Verdict was had and judgment rendered for the landlord for the fixed sum of one hundred dollars, from which he appeals and insists upon his right to recover by distress the aliquot of the antecedent debt, according to the contract of lease.

The claim of appellant cannot be maintained. The right and the remedy of the landlord are established and fixed by the law, and rest upon the existence of the relation of landlord and tenant, and it is essential that the demand of the landlord shall be for the rent of the land. The agreement of the tenant to pay an antecedent debt as rent does not and cannot change its nature or bring it within the protection of the statute. A past-due debt is not rent, and calling it such, or agreeing that it shall be so treated and considered, cannot entitle the creditor to resort to the summary remedy for its collection. The contract of the debtor is but an ordinary promise to pay, and for its breach the creditor must resort to the usual remedies. *Judgment affirmed.*¹

HOBY v. ROEBUCK AND PALMER

7 Taunt. 157. 1816.

THIS was an action of *assumpsit*. Upon the trial of the cause before Gibbs C. J. at the sittings after *Trinity* term, 1816, it appeared that the Plaintiff had leased for twenty-one years to Roebuck, who afterwards took Palmer into partnership in his trade, for the purposes of which the demised premises were used, but were not sufficiently large; wherefore the Defendants jointly agreed by parol with the Plaintiff, that if he would erect an additional story over the house, they would pay him, during the residue of the demised term, besides the former rent, 10 *per cent.* on the cost. The building was erected, and after they had paid the increased rent for some years, Palmer, before the debt accrued for which this action was brought, quitted the partnership and the premises. *Lens* and *Vaughan* Serjts. contended that Palmer was not liable in this action, for that this contract for an additional rent was a demise of the new buildings, and ought, according to the statute of frauds, to have been in writing. Gibbs C. J. thought otherwise, for that whatsoever was built, instantly became parcel of the premises already demised; and that this was a collateral contract, to which Palmer, no less than Roebuck, was chargeable during the residue of the term; and the jury found a verdict for the Plaintiff.

¹ See *First Bank v. Flynn*, 117 Iowa 493; *Miners' Bank v. Heilner*, 47 Pa. 452; *Smith v. Mapleback*, 1 T. R. 441.

Vaughan now moved for a new trial: he urged that the increased payment might be recovered by distress on the premises, as rent; Palmer's interest, in respect of which he was liable, was only co-extensive with his partnership with Roebuck.

The Court held, that the original lease still existed: the new contract was, therefore, no demise of the premises. Only the original rent could be distrained for, and this was merely a collateral agreement to pay so much more money during the residue of the term, if the lessor would make the desired expenditure.

*Rule refused.*¹

¹ *Donellan v. Read*, 3 B. & Ad. 899, *accord*.

"Distress is a remedy that can be employed only for the recovery of what is properly rent and is reserved as such. It may be sustained where the sum originally stipulated for has been increased by agreement, as in *Brisben v. Wilson*, 60 Pa. 452, where the tenant agreed to pay the additional sum in consideration of the landlord's acceptance of the surrender of the lease; or where the lease provides for an increase if improvements are made to the property demised, as in *Detwiler v. Cox*, 75 Pa. 200; or where the lessee agrees to pay a fixed sum for gas furnished by the landlord and used on the premises, as in *Fernwood Masonic Hall Assn. v. Jones*, 102 Pa. 307. In these cases the additional payments were to be made to the lessor as rent, and were certain in amount or certain in the sense that they could be made certain. *Id certum est quod certum reddi potest*. But covenants that relate to the use of the premises, but not to the payment to the lessor for the use, do not give the right to distrain. In *Latimer v. Groetzinger*, 139 Pa. 207, it was held that a covenant not to engage in another business on the premises under penalty to be paid in the nature of rent in monthly installments was a mere personal covenant for the payment, not of rent but of a penalty, and that the incident of distress did not attach to it. *Fernwood Masonic Hall Assn. v. Jones*, *supra*, relied on by the appellant, is not an authority in his favour. In that case the gas to be paid for by the tenant was manufactured on the premises and furnished by the lessor, and the payment was to be made to him. This appears in the report of the case and more fully in the paper-books. We do not decide that the rent might not be reserved in such a manner as to include the water rent and give the right to distrain for it. But in this case there was no such stipulation. Standing alone a covenant to pay water rent is a covenant to pay to the party entitled, in this case the municipality, and it cannot be enforced by distress."—*Per FELL, J.*, in *Evans v. Lincoln Co.*, 204 Pa. 448, 452.

"It will appear from an examination of the decisions of the Supreme Court of Pennsylvania, that definite sums, or sums capable of being made definite, chargeable on the demised premises by way of taxes, or for gas and water, or for improvements and betterments and such like, will be considered as rent or included therein when the intention to so consider them is made clear in the contract between the lessor and lessee. Sums thus made part of the rent may be distrained for by the landlord and are entitled to the preference given by the laws of Pennsylvania to rent for one year over liens by execution or otherwise. *Morgan's Estate*, 30 Wkly. Notes Cas. (Pa.) 509; *Detwiler v. Cox, et al.*, 75 Pa. 200; *Fernwood Masonic Hall Ass'n v. Jones*, 102 Pa. 307; *Evans v. Lincoln*, 204 Pa. 448, 54 Atl. 321; *Latimer v. Groetzinger et al.*, 139 Pa. 207, 21 Atl. 22.

"In some of the cases it was held that the sums claimed as rent had not been clearly reserved as such by the contract between the parties, and

B. *Apportionment, Suspension, and Extinguishment*

MARSHALL ET AL. v. MOSELEY

21 N. Y. 280. 1860.

COMSTOCK, Ch. J.¹ Mrs. Coe, by virtue of her husband's will, had a life estate in the premises, out of which the rents in question accrued, and the plaintiffs owned the remainder in fee. She died April 5, 1855, the leases being then unexpired.² On the 1st of May following, the rents became due for the preceding quarter of a year. The defendant is the executor and residuary legatee of Mrs. Coe, and having collected the rents for the whole quarter, the principal question in the case is, whether he is entitled to apportion them by dividing the quarter into two periods of time, one before and the other after her death, and by retaining in his own hands the portion which accrued before that event.

As rent follows the reversionary estate, the law allows it to be apportioned where that estate becomes divided amongst different owners. This is according to the maxim, "*accessorium sequitur naturam sui principalis*." Thus if a reversion descend on the death of the ancestor who gave the lease, and the coparceners or heirs make a partition, the rent will be apportioned in favor of each of them. So if the reversion be severed by will or even by conveyance of the owner, the same result will take place. (2 Platt on Leases, 131, 132, and cases cited.) But the same reasons never existed for apportioning rent on the principle of time where the tenant was bound to pay it at stated periods. The sum accruing between each of the times of payment was a single entire debt, and was due only on the condition precedent of the tenant being entitled to enjoy the premises for the time in respect to which it was payable. If, therefore, a person having a life estate, with no power to make a lease to continue longer than during his life, should make a lease for years reserving rent half yearly, and should die in the middle of a half year, the rent, according to the principles

the distinction is drawn between mere personal covenants on the part of the lessee to pay certain sums and a reservation of the same by the lessor as rent. In none of them, however, is it decided that the rent might not be reserved in such a manner as to include such sums as are above described." — *Per* GRAY, J., in *McCann v. Evans*, 185 F. R. 93, 95.

An agreement to pay taxes was held an agreement to pay rent in *Neagle v. Kelly*, 146 Ill. 460; *Gedge v. Shoenberger*, 83 Ky. 91; *Roberts v. Sims*, 64 Miss. 597; *Knight v. Orchard*, 92 Mo. App. 466. But not in *Hodgkins v. Price*, 137 Mass. 13; *People v. Swayze*, 15 Abb. Pr. (N. Y.) 432. See *Garner v. Hannah*, 6 Duer (N. Y.) 262, 266; L. R. A. 1915 A. 355 note.

¹ The statement of facts, part of the opinion, and the dissenting opinion of CLERKE, J., are omitted.

² These leases were created by the testator under whose will Mrs. Coe and the plaintiffs claimed.

of the common law, would be lost for the half of a year. The executor or representative of the lessor could not recover it because by the nature of the contract the lessor was not entitled to it except in the sums and at the times specified in the lease. His successor in the reversionary estate could not claim it for the additional reason that the reversion was not his until the lease itself was terminated by the death of the life tenant who gave it. If the lessee continues to hold afterwards, such holding is necessarily under some new contract with the party on whom the estate has devolved. (Woodfall's Land. and Ten., 248; 1 Salk., 65; 1 P. Wm., 392; 2 Id., 501, 502; 1 Man. & Gr., 589, 13 N. H., 343; 11 Mass., 493.)

If, however, the lease continues, although intermediate the days of payment the reversion passes wholly into new hands, the obligation of the lessee to pay rent continues also. Thus in the middle of a quarter the lessor may convey the whole estate which is under the lease, or it may be sold under execution or mortgage, or he may die leaving it to descend to his heirs, or he may dispose of it by will. The lease itself is unaffected by these events, and the rent is therefore payable as though they did not occur; but it is payable only in the sums and at times specified in the demise. The reversion may be transmitted to a new owner during a period between the days of payment, but such an event does not divide the obligation of the tenant. The accruing rent follows the reversion wheresoever that goes, and neither the former owner nor his representative can recover any portion of it. Being recoverable only in a single sum and not until the prescribed day of payment, the common law gives it to him who is the reversioner at that time, and no case can be found where a court of equity has adopted a different rule. Says Mr. Woodfall (Law of Landlord and Tenant, 248), "at common law rent cannot be apportioned, but the reversioner becomes entitled to the accruing rent from the rent day antecedent to the decease of the tenant for life, whose representative was entitled to the arrearages due at some rent day before the death of the testator, or the intestate; for the law does not apportion rent in point of time nor does equity." (See also 2 Greenleaf's Cruise, p. 116, §§ 44, 45, 46, *Ex parte Smith*, 1 Swanst., 337, and note, and other cases cited, *supra*.) It is true there are in the English books some cases of a peculiar kind, where on the death of a tenant for life before the day of paying rent for the current quarter or other period, the rent has been divided between his representative and the remainderman; but these are all cases in which the lease terminated on the decease of the life tenant; either because he had no power to lease so as to affect the remainderman, or because if such a power was given to him it had been defectively executed, and the lessee, holding the premises until the rent day, voluntarily paid the whole to the person who succeeded to the estate. In all

the cases of this kind the lessee was not at common law bound to pay at all for so much of the time since the last rent day, as had elapsed before the death of the tenant for life, but having conscientiously paid for the whole time, the person who took the estate in remainder was held by the courts of equity to have received for the use of the executor, or his life tenant, so much of the rent as accrued beyond his decease. (*Ex parte, Smyth, supra; Paget v. Gee*, 1 Ambler, 199.) In these instances the rent actually paid was apportioned or divided on the principle of time; but cases of this kind have no tendency to show that such an apportionment can be made when the lease remains as before, notwithstanding a change of parties entitled to the rents takes place intermediate the rent days. The lessee in that case is bound to pay for the whole time, and the reversioner, or remainderman, takes the rent as an entire sum due to him by the terms of the contract.

The well ascertained rules of the common law are, therefore, opposed to the claim of the defendant to retain any portion of the rents received by him for the quarter during which his testator, the life tenant, died. The leases were not determined by that event, and the plaintiffs, who as remaindermen succeeded to the reversion, were entitled to the whole of those rents. It has also been observed that the courts of equity have never departed from the rule of law on this subject.

It seems hardly necessary to say now that there is no legislation of this State which the defendant can invoke in support of his claim. In England, one of the rules of law in regard to apportionment of rent was abrogated by an act of Parliament, passed in the reign of George II. That statute (2 Geo. II, c. 19), after noticing that by the existing rule rents were frequently lost, where a lessor having only a life estate died before or on the day when it would be payable, declared that when any tenant for life should happen so to die, his executor or administrator might recover the whole rent in arrear, in case such death took place on the day fixed for payment, or if it happened before that day, then a proportion, according to time, making all just allowances, &c. That legislation, with some change in phraseology, has been followed in this State.¹ Our statute (1 R. L., 438; 1 R. S., 747, § 22) provides that when a tenant for life, who shall have demised lands, shall die before the day when any rent is to become due, his executors may recover "the proportion of rent which accrued before his death." In the case provided for, therefore, rent can be apportioned in opposition to the rule of the common law, and a recovery had, where, but for the statute, the rent would be lost. But the statute does not include the present case. The leases in question were not given by a tenant for life, but by the owner of the fee, and the

¹ See New York, Civil Code of Procedure (1920), § 2674; *Matter of Weeks*, 5 Dem. (N. Y.) 194; *Miller v. Crawford*, 26 Abb. N. C. (N. Y.) 376.

disputed rent was not liable to be lost, because the plaintiffs, succeeding to the reversion, could recover the whole of it by action founded on the very leases themselves. The English statute, like ours, was enacted to remedy the apparent injustice of the rule which absolved a lessee from paying any rent, where his interest was determined between the rent days by the expiration of a life estate on which the lease depended. More recent legislation in England has gone still further. The statute of 4 W. IV, c. 22, after reciting that by law rents due at fixed periods were not apportionable, and after reciting the inconvenience of that rule, proceeds to declare that all rents made payable at such periods under any instrument executed after the passing of the act, should be apportioned so that on the termination, by death or any other means, of the estate of the person entitled to the rents, such person, or his representative, should have a portion of such rents, according to the time elapsed since the last period of payment. By a further provision, the entire rent is to be received and recovered from the tenant, by the person who would be entitled to recover it if the act had not been passed, and is to be held by him subject to apportionment, which can be enforced against him by suit at law, or in equity. It will be seen that this statute recognizes the old rule, while it declares a new one for future leases, and that it also carefully protects the tenant against more than one action for the entire rent. We have no such legislation in this State. If we should adopt the principle of that statute, in regard to apportionment, without legislative interference, we should not only change the existing law, but the change must be made without the protection to tenants which the English statutes secures. If we declare rent to be apportionable in cases like the present, it will follow, according to our rules of pleading and practice, that each party entitled to a share may sue the tenant to recover it. To illustrate, if the defendant has no interest in the rents now in question, then he cannot retain the portion in his hands. If he has an interest, then to that extent he could, under our practice, recover so much as belonged to him, by suit against the tenants, if they had not paid these rents. And I think that even a notice to the tenants of his claim to a share, would take away from them their right to pay the entire sum to the persons who, as remaindermen, would be entitled to the other share. To conclude on this point, we find that the rule of law denying apportionment in a case like this, has never been shaken; and whatever may be the arguments, founded in justice or expediency, in favor of a different rule, we think those arguments should be addressed to the legislature, rather than to the courts.

We are, therefore, of opinion that the judgment must be affirmed. DENIO, SELDEN, WRIGHT and WELLES, Js., concurred.¹

¹ CLERKE, DAVIES, and BACON, Js., dissented.

See *Bloodworth v. Stevens*, 51 Miss. 475; *Allen v. Van Houton*, 4 Harr.

MORSE v. GODDARD

13 Met. (Mass.) 177. 1847.

THIS was an action of debt, brought to recover five dollars, the amount of one month's rent of a tenement. At the trial in the court of common pleas, before *Washburn*, J. on appeal from a justice of the peace, the plaintiff put into the case a lease, made by him to the defendant, dated January 6th, 1846, of a certain tenement, for one year, reserving rent in monthly payments, and stated that the action was brought for the rent of the month ending April 6th, 1846. The defendant admitted that he entered into the tenement, under the lease, and that he was still in possession. But he proposed to show, in defence, that in February 1846, W. M. Benedict and P. Merrick, being the owners of the tenement, entered into the same, and required the defendant to pay rent to them, and that he, in order to prevent being expelled therefrom, agreed to pay rent to them, after that time. The plaintiff objected to the competency of such evidence; but the court ruled that it was admissible. Thereupon the defendant introduced evidence tending to show that, on the 21st of February 1846, the attorney of said Benedict and Merrick (in company with two witnesses) met the plaintiff in the street, and informed him that he was going to take possession of that part of the house in which the defendant lived; that said attorney and two witnesses went to the house, and went into the part occupied by the defendant, and told him they had come to turn him out unless he would agree to attorn, and become the tenant of said Benedict and Merrick, and pay rent to them; that the defendant yielded, and agreed so to pay rent; that they went from the house, and found the plaintiff, and told him what had been done, and what the defendant had agreed to do. It did not appear that any evidence was shown to the defendant, at that time, of any title in Benedict and Merrick. In order to prove their title at the trial, the defendant introduced sundry deeds, and other evidence. [See *Benedict v. Morse*, 10 Met. 223.]

The judge instructed the jury, that if the defendant *bona fide* yielded possession of the premises to Benedict and Merrick, to prevent being actually expelled, and the plaintiff then had notice of this; and if the defendant had satisfactorily proved that Benedict

(N. J.) 47; *Bank of Pennsylvania v. Wise*, 3 Watts (Pa.) 394; *Clun v. Fisher*, Cro. Jac. 309; *Jenner v. Morgan*, 1 P. Wms. 391; Warren, Cas. Wills and Adm., p. 476. Compare *Hammond v. Thompson*, 168 Mass. 531; *Willis v. Kronendonk*, 200 Pac. (Utah) 1025; *Rockingham v. Penrice*, 1 P. Wms. 177; *Southern v. Bellasis*, 1 P. Wms. 179 note.

For statutes in the United States authorizing the apportionment of rent in point of time, see 1 Tiffany, Landl. and Ten., p. 1077.

and Merrick owned the estate by a good title, and had a right to take immediate possession, at the time when they undertook to turn the defendant out of possession — their title and possession being adverse to those of the defendant and his lessor — such yielding of possession was equivalent to an actual ouster, and was competent evidence in defence to the plaintiff's claim, sued in this action for rent accruing after such yielding of possession; the burden of proof being upon the defendant.

The jury returned a verdict for the defendant, and the plaintiff excepted to the judge's instructions.

SHAW, C. J. In a justice action of debt for a month's rent, the defence was, that the defendant had been ousted, by persons having a paramount title, before the commencement of the time for which the rent was claimed.

The defendant offered evidence to show, that persons having a valid title, paramount to that of the defendant and his lessor, the plaintiff, and having an immediate right of entry, and of possession under it, made an actual entry on the premises, and required the defendant to pay rent to them from the time of such entry, or quit the premises. But it is objected to this defence, that a tenant cannot contest the title of his lessor, nor set up a paramount adverse title in a third person. And we think it well settled, that a lessee, taking the estate of his lessor, and entering into possession under it, admits his title, and is estopped from denying that title; or, what is in effect the same thing, is estopped from setting up an outstanding title in a third person. *Doe v. Smythe*, 4 M. & S. 347. *Doe v. Mills*, 2 Adolph. & Ellis, 17. But this is not inconsistent with another rule, that where there is an eviction or ouster of the lessee, by a title paramount, which he cannot resist, it is a good bar to the demand for rent, on the plain ground of equity, that the enjoyment of the estate is the consideration for the covenant to pay rent, and when the lessee is deprived of the benefit, he cannot be held to pay the compensation. Bac. Ab. Rent, L. Cruise's Dig. tit. 28, c. 3. It is not enough, therefore, that a third party has a paramount title; but, to excuse the payment of rent, the defendant must have been ousted or evicted, under that title. *Hunt v. Cope*, Cowp. 242. *Pendleton v. Dyett*, 4 Cow. 581.

But an eviction under a judgment of law is not necessary. An actual entry, by one having a paramount title and present right of entry, is an ouster of the tenant. He cannot lawfully hold against the title of such party. He is not bound to hold unlawfully, and subject himself to an action, and is not, therefore, compellable to resist such entry. *Hamilton v. Cutts*, 4 Mass. 349. So, when an execution creditor is put into possession by the sheriff, under the levy of an execution, he has the actual and exclusive possession, and may maintain trespass. *Gore v. Brazier*, 3 Mass. 523.

There is a recent case, which seems to us alike in principle. *Smith v. Shepard*, 15 Pick. 147. A mortgagor in possession made a lease for years, reserving rent. Afterwards, the mortgagee, having a paramount title, entered, as he lawfully might, with right to take the rents and profits. In a suit by lessor against lessee for rent, such entry under a paramount title was held to be an ouster, and a good bar to the action.

It is to be understood, that when a tenant thus relies on an ouster *in pais*, without judgment, he has the burden of proving the validity of the elder title, the actual entry under it, and that he acted in good faith, and without collusion with the party entering.

The instruction to the jury was, that if the defendant, *bona fide*, had yielded possession of the premises to Benedict and Merrick, to prevent being actually expelled; that the plaintiff had notice of this; and that, upon the evidence, Benedict and Merrick had a good title, paramount to that of the defendant and his lessor, and the right of immediate possession; their entry was equivalent to an actual ouster, and was a good defence to the action for rent. This direction, we think, was right; and the jury, by returning a verdict for the defendant, affirmed these facts.

*Exceptions overruled.*¹

THE FIFTH AVENUE BUILDING CO. v. KERNOCHAN,
AS EXECUTOR

221 N. Y. 370. 1917.

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1917, which affirmed an order of Special Term overruling a demurrer to the answer.

The following questions were certified: "1. Is there an implied covenant for quiet enjoyment in the lease set forth in the pleadings in this action? 2. Are the defenses and counterclaims in the defendant's answer sufficient in law upon the face thereof?"

The nature of the action and the facts, so far as material, are stated in the opinion.

CARDOZO, J. The action is for rent. The plaintiff leased to the defendant's testator part of the first floor and basement of the Fifth Avenue Building in the city of New York. By the terms of the lease, the basement included a vault beneath the sidewalk. This

¹ *Lambert v. Estes*, 99 Mo. 604, *accord*. And see 18 L. R. A. N. S. 396 note.

Damages for breach of covenant for quiet enjoyment in leases. 3 Williston, Contracts, § 1404.

On interference with lessee's possession by a third person without right, see 7 A. L. R. 1103 note.

vault was in fact maintained under a revocable license from the city of New York. During the term of the lease, the city revoked the license and excluded the tenant, at first from the whole vault, and later from part of it. The rent in suit accrued during the period of exclusion. The defense is a partial eviction with a demand that the rent abate in proportion to the diminished rental value. The lease contains no express covenant for quiet enjoyment. The landlord insists that in the absence of such a covenant, eviction is no defense. We do not share that view.

Eviction as a defense to a claim for rent does not depend upon a covenant for quiet enjoyment, either express or implied. It suspends the obligation of payment either in whole or in part, because it involves a failure of the consideration for which rent is paid (*Royce v. Guggenheim*, 106 Mass. 202; *Morse v. Goddard*, 13 Metc. 179; *O'Brien v. Ball*, 119 Mass. 28; *Lodge v. Martin*, 31 App. Div. 13, 14; *Lawrence v. French*, 25 Wend. 443; *Pendleton v. Dyett*, 4 Cow. 581, 583; 8 Cow. 727, 730; 18 Halsbury Laws of England, Landlord and Tenant, 479, 480, 482; Cruise Dig., title 28, ch 3., sec. 1; Bacon Abridg., Rent L.; Woodfall Landlord & T. [19th ed.] 478, 486.) We are dealing now with an eviction which is actual and not constructive. If such an eviction, though partial only, is the act of the landlord, it suspends the entire rent because the landlord is not permitted to apportion his own wrong. If the eviction is the act of a stranger by force of paramount title, the rent will be apportioned, and a recovery permitted for the value of the land retained (*Christopher v. Austin*, 11 N. Y. 216; *Blair v. Claxton*, 18 N. Y. 529; *Duhain v. Mermod, J. & K. J. Co.*, 211 N. Y. 364; *Royce v. Guggenheim*, *supra*). The right to an abatement of the rent in such circumstances does not grow out of the covenant for quiet enjoyment. It has been enforced in cases where there was no breach of any covenant (*Gates v. Goodloe*, 101 U. S. 612, 619; *Gillespie v. Thomas*, 15 Wend. 464; *Lodge v. Martin*, *supra*, and cases there cited). In the days of common law pleading, it was the subject of a plea in bar (*Pendleton v. Dyett*, *supra*; *Smith v. Shepard*, 15 Pick. 147, 149). A covenant for quiet enjoyment, either express or implied, is essential where eviction by title paramount is the subject of a claim for damages. It is not essential where the tenant asserts a failure, either complete or partial, of the consideration for the rent. *Carter v. Burr* (39 Barb. 59) neatly illustrates the distinction. There a lease had been made in fee. Such a lease, unlike one for years, was held to be a conveyance of real estate, and no covenant was implied. For that reason, the tenant's claim for damages as the result of a partial eviction was rejected, but none the less he was held to be entitled to an abatement of the rent. [The learned judge then considered provisions of the New York, Real Property Law (Consol. Laws. ch. 50, §§ 2, 240, 251),¹

¹ § 251. "A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not."

and decided that they did not prohibit the implication of a covenant for quiet enjoyment in a lease. He concluded as follows:] The rule that a covenant for quiet enjoyment will be read into a lease has become a settled rule of property. We cannot believe that the legislature would have overthrown such a rule without clearer token of its purpose. It would not have retained the old phrases, and left a change of meaning to be gathered by doubtful inference from the order of the sections. More significant than anything which it did change are the things which it omitted to change. The ancient landmarks have been preserved.

Any other conclusion would lead indeed to strange anomalies. A covenant for quiet enjoyment will be implied in oral leases. It results from the mere relation of the parties (*Markham v. Paget*, 1908, 1 Ch. 697; *Budd-Scott v. Daniell*, 1902, 2 K. B. 351; *Dexter v. Manley*, 4 Cush. 14; *Rawle Covenants of Title*, sec. 274). But the statutory definition of conveyances is limited to instruments in writing (Real Prop. L. sec. 205, now sec. 240). The landlord, therefore, would have us hold that the covenant is implied when the lease is oral and rejected when the lease is written. Such a distinction, if it is to be made, must rest upon a clearer manifestation of the legislature's purpose.

One other argument in support of the landlord's claim remains to be considered. The tenant, it is said, was chargeable with knowledge that the landlord's occupation of the highway was by force of a revocable license (*Deshong v. City of N. Y.*, 176 N. Y. 475). From this imputed knowledge, the consequence is deduced that ouster by the city was by implication excepted from the covenant, and that the tenant, having taken his chances, must continue to pay rent. But the language of the lease repels that view of the relation. It is all a question of intention, and here the intention is unmistakable. The vault and the rest of the basement are joined in a single description; and the whole is leased to the tenant for a term of ten years. Nothing in the lease suggests a distinction between the landlord's duties in respect of one part and his duties in respect of others. We cannot doubt that the enjoyment of the whole was the consideration for the rent. The purpose could hardly have been clearer if the vault had been leased alone. The space within the highway was more than an incident or an appurtenance. It was the subject-matter of the grant. Being the subject-matter of the grant, it was also the subject-matter of the covenant (*Pabst Brewing Co. v. Thorley*, 145 Fed. Rep. 117; 179 Fed. Rep. 338).

In thus holding, we place the incident of loss where justice requires it to fall. Without warning the tenant of the chance of revocation, the landlord undertook to make a lease which should continue for a fixed term. We will not whittle down the consequences that normally attach to such a letting by nice assumptions

of constructive notice. The tenant had the right to take the landlord at his word. Whether the paramount title be public or private, the consequence of ouster is a suspension of the rent.

The order should be affirmed with costs, and the questions certified answered in the affirmative.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and CRANE, JJ., concur. *Order affirmed.*¹

WHITEHALL COURT LIM. v. ETTLINGER

[1920] 1 K. B. 680. 1919.

TRIAL of action before Earl of READING C. J. without a jury.

The plaintiffs were the owners of a block of buildings known as Whitehall Court, which were let out in flats, two of them being let to a Mr. Karl Ettlinger under two leases dated respectively June 3 and November 21, 1915, each of them for a term of three years from June 24, 1915, at the rents of 475*l.* and 200*l.* per annum respectively, the tenant covenanting to pay the rents reserved by the leases.

Each of the leases contained a clause (No. 16) that the landlords would supply and the tenant would purchase from them only all food, wines, spirits and all other consumable and domestic stores and fuel which the tenant might require for use upon the premises at the current tariff price from time to time in force at Whitehall Court.

In December, 1916, the competent military authorities, acting under the Defence of the Realm Regulations, served a notice upon the tenant stating that the War Department required immediate possession of his flats. The tenant objected to give up possession. On May 17, 1917, the tenant was informed by His Majesty's Office of Works that the requisitioning of his flats by the military authorities, notice of which had been given on December 14, 1916, must take immediate effect, and that possession would be required by Saturday night, May 19. The tenant accordingly vacated the flats and went to an hotel, the furniture being removed from the flats by H.M.'s Office of Works. He refused to occupy a flat which it was suggested that he should occupy in substitution for the two flats.

The tenant was informed by H.M.'s Office of Works that the commandeering of his flats did not terminate his personal liability to the landlords, and that he must make a formal claim for compensation upon the proper form to the Defence of the Realm Losses Commission, and that until such claim had been duly completed and sub-

¹ See *Fillebrown v. Hoar*, 124 Mass. 580; *Cheairs v. Coats*, 77 Miss. 846; *Seabrook v. Moyer*, 88 Pa. 417; *Poston v. Jones*, 2 Ired. Eq. (N. C.) 350; *Stevenson v. Lombard*, 2 East 575.

mitted to the Commission the Office of Works could not assume the responsibility for the rent of the flats; but that if the claim was duly made the Board would recommend to the Defence of the Realm Losses Commission that he should be indemnified against the obligations under his agreement during the period of the Government occupation. The tenant however refused to make any claim to the Commission, contending that he was not liable for the payment of rent in respect of the two flats under the two leases after the Government took possession. The plaintiffs, as landlords, also refused to make any claim to the Commission, and relied upon their right against the tenant for payment of the rent in respect of the two flats under the terms of the two leases.

The tenant paid the rent for the two flats to the plaintiffs up to May 19, 1917, when the military authorities took possession of the flats but declined to pay rent subsequent to that date.

The military authorities were still in occupation of the two flats when the two leases expired on June 24, 1918.

The plaintiffs sued the tenant to recover 405*l.* 19*s.* 6*d.*, the balance of the rent due in respect of the two flats to December 25, 1917. While the action was pending the tenant died, and the action was continued against his executrix.

EARL OF READING C. J. The question to be determined in this case is whether or not the plaintiffs are entitled to recover the rent due under the leases by virtue of the covenant to pay rent therein contained into which the tenant had entered with the plaintiffs. I have come to the conclusion that there is nothing in the facts and circumstances of this case which would justify me in saying that the tenancy created by the leases had been thereby determined. If I were dealing with a commercial contract, or an agreement between the parties which did not also amount to a demise of the premises as in this case, there would be great force in the arguments which were put before me. It was said in the first place that this is a case of eviction by title paramount, and if it were so Mr. Givven would have made good the first proposition upon which he rested his case. But I am not satisfied that this was an eviction at law. When the tenant moved away from the flats he did so by force of circumstances — that is, by the order of the Government authorities. I do not think however that it could be said that he was evicted by title paramount. In the circumstances there was no eviction of him by the Government and no determination of the estate created by the leases. The tenant, for all he knew, might have been able to return to the flats after a short absence, on the other hand he might have to remain away a long time as in the present case, even until the end of the term. I am however not satisfied that this case is brought within the principle to which reference has been made — namely, that this is an eviction by law — that is, by title paramount. If it were I should have to hold that the act of the Government in calling upon

the tenant to give up occupation of these premises to the War Office operated as a determination of the estate created by the leases. There is nothing in the notice which was served upon the tenant to show that the Government required more than the occupation of the premises for an undefined period. Notice was first given to the tenant in December, 1916, that the premises had been requisitioned and that possession would be required by a certain time, and asking him to make arrangements to move from the flats. This appears to be the way in which matters were left right up to the end of the term in June, 1918. Nothing further seems to have been done. It is true, as Mr. Giveen contends, that there was a requisition of premises for the time being, but that is all the notice amounts to. I cannot read it as amounting to an eviction in law of the tenant. Reference was made by Mr. Giveen to a passage in Bacon's Abridgment, vol. vii., p. 58, which was taken from Rolle's Abridgement, and afterwards repeated in Gilbert on Rents, p. 145, where the law is laid down as follows: "That if the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction: but, notwithstanding such recovery or eviction, the tenant shall pay the rent that became due before the recovery: because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued, the obligation must be in force; there being the same reason that the tenant should pay the rent, for part of the time contracted for, as for the whole term, if he had enjoyed the land so long." The same observation that I have already made would also apply to this statement of the law. The whole question is whether there has been an eviction by title paramount. The first point therefore fails.

The second point taken by Mr. Giveen was that there had been a determination of the whole tenancy by reason of the requisition of the flats. It seems to me that that depends upon much the same considerations. It is said that, looking at all the circumstances, treating the case as one would an ordinary contract, and applying the general principles which are not in dispute, I ought to hold the whole tenancy to be at an end. But I find the same difficulty with regard to this point as I did with regard to the first point. The judgment of Lush J. in *London and Northern Estates Co. v. Schlesinger*, [1916] 1 K. B. 20, 24, has been cited, where he said: "It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement." I think that dictum applies to the present case. I can see no reason why the chattel interest which was vested in the tenant by virtue of the two leases was affected merely because he was personally pre-

vented from residing in the flats. If I were dealing with an ordinary contract I should feel great force in the argument addressed to me by Mr. Giveen, but I can find no authority and no justification for saying that I must apply to the present case the principles laid down in the citations made by Mr. Giveen. The agreements contained in the leases are not only contracts, they also create an estate by demise for a term of years. Therefore I think that the plaintiffs are entitled to recover their rent. This decision still leaves the tenant free to claim from the Defence of the Realm Losses Commission for an indemnity in respect of his payment of rent. He has not been able to enjoy the occupation of the premises as he thought to do when he entered into the tenancy, nevertheless he has agreed to pay rent, and I cannot find sufficient ground for saying that he is excused from paying rent, and therefore I must give judgment for the plaintiffs with costs.

Judgment for plaintiffs.¹

ROBBINS v. McCABE

239 Mass. 275. 1921.

APPEAL from Municipal Court of Boston, Appellate Division; John G. Brackett, Judge.

Action by Elliott D. Robbins against Catherine A. McCabe. From an order of the appellate division of the municipal court dismissing the report of the trial judge, defendant appeals. *Affirmed.*

The declaration alleged the execution of the lease mentioned in the opinion, that plaintiff had fully kept and performed all its terms, agreements, and covenants, but that defendant had neglected and refused to pay the rental therein reserved, and was indebted to plaintiff in the sum of \$1,500, being 12 equal monthly payments from May 1, 1919, to May 1, 1920. The court gave defendant's first request and refused her second and third requests. The second requested ruling was that the plaintiff could not recover for the repairs charged

¹ A lease of land and house contained covenants to pay rent, to insure, to deliver up in repair, and in case of fire, to expend the insurance money in rebuilding. During the lease the military under the Defence of the Realm Act took possession and occupied until after the end of the term. The lessee paid some rent after being dispossessed. Later, six weeks before the end of the term, the house burned down and was not rebuilt. It was held that the lessee must pay the last quarter's rent, but was not liable on the covenants to yield up in good repair or to rebuild. *Curling v. Matthey*, [1920] 3 K. B. 608.

In the United States when the whole of leased premises are taken by eminent domain the liability for rent usually comes to an end. *Corrigan v. Chicago*, 144 Ill. 537; *O'Brien v. Ball*, 119 Mass. 28; *Barclay v. Pickles*, 38 Mo. 143; *Lodge v. Martin*, 31 App. Div. (N. Y.) 13. *Contra*, *Foote v. Cincinnati*, 11 Ohio 409. Compare *Dyer v. Wightman*, 66 Pa. 425; *McCardell v. Miller*, 22 R. I. 96.

for in his declaration on all the evidence. The third request was that, if the court found as a fact that the property leased to defendant was leased for a specific purpose, and that purpose was known to plaintiff before the lease was executed, and if the business for which defendant hired the premises became illegal under the laws of the United States, there could be no recovery by plaintiff under the lease for any period of time after the business became illegal.

CROSBY, J. The plaintiff executed and delivered to the defendant a written lease of certain real estate for a term of five years from the first day of September, 1915. The lease provides that certain repairs shall be made by the lessee during that period. Under date of April 20, 1917, the lessee assigned the lease for the remainder of the term to the firm of G. L. Sullivan & Co., the plaintiff in writing consenting thereto, "but without releasing said Catherine A. McCabe from liability thereunder by reason of her said assignment. . . ."

1. The report recites that the action is to recover "rental and cost of repairs under a written lease"; but the declaration alleges that the defendant is "indebted to the plaintiff [in] the sum of fifteen hundred dollars, that being twelve equal monthly payments from May 1, 1919, to May 1, 1920." As there is no allegation that the defendant is indebted for the cost of repairs and no claim is made therefor, it follows that no recovery could be had on that ground. The statement in the report that the action is to recover for the cost of repairs is erroneous, that ground of recovery not having been pleaded. The cause of action named in the declaration must govern.

2, 3. The only questions of law appearing in the record arise by reason of the refusal of the trial judge to make the second and third rulings requested by the defendant. The second was properly refused, it was inapplicable in view of the pleadings. The third request was rightly refused.

The trial judge found that the plaintiff knew and understood that the premises had been occupied by the defendant for the sale of intoxicating liquor and it was her desire and intention to continue in the liquor business on the leased premises; and that the plaintiff knew the property had "a special and peculiar value as a liquor saloon on account of its location, and that if used for any other purpose its value would be much less." These findings do not relieve the defendant from the covenant to pay rent, even if before the expiration of the term the sale of intoxicating liquor upon the premises was prohibited by law. Nothing in the written instrument prevents the lessee from occupying the property for any lawful trade; it contains no reference to the character of the business to be conducted there, nor anything from which it could be inferred it was meant by the parties that the defendant should be released from liability for the payment of rent, if at any time during the term it became unlawful to carry on the liquor business there.

The findings that the parties understood and intended that the defendant should carry on the liquor business on the premises do not affect the result; the terms of the written instrument are free from ambiguity, and cannot be affected by any intention of the parties contrary to its provisions. *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973; *Gaston v. Gordon*, 208 Mass. 265, 94 N. E. 307. It is conclusively presumed to express the contract. *Jennings v. Puffer*, 203 Mass. 534, 89 N. E. 1036; *Perry v. J. L. Mott Iron Works Co.*, 207 Mass. 501, 93 N. E. 798; *Gaston v. Gordon*, *supra*. If the parties contemplated that the lease should be modified or terminated before the expiration of the term in the event that the sale of intoxicating liquor on the premises for any reason should be unlawful, a provision to meet that contingency should have been inserted therein.

The findings of the court, if treated as findings that the property was leased for a "specific purpose and that that purpose was known to plaintiff before the lease was executed" were immaterial; the lease is to be construed in accordance with its plain language and cannot be affected by the previous oral understanding of the parties.

4. The rule that incompetent evidence admitted without objection is to have its appropriate probative effect, *Orpin v. Morrison*, 230 Mass. 529, 531, 533, 120 N. E. 183 has no application to the facts in the case at bar. *Order dismissing report affirmed.*¹

¹ The adoption of a law prohibiting the sale of liquor has not been held to justify a tenant in refusing to pay rent for property which the parties intended to be used as a saloon. *Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776; *Shreveport Ice Co. v. Mandel*, 128 La. 314; *Kerley v. Mayer*, 10 Miscel. (N. Y.) 718, *aff'd.* in 155 N. Y. 636; *Miller v. Maguire*, 18 R. I. 770; *San Antonio Brewing Assoc. v. Brents*, 39 Tex. Civ. App. 443; *Hayton v. Seattle Brewing Co.*, 66 Wash. 248; *Hecht v. Acme Coal Co.*, 19 Wyo. 18. *Contra*, *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69.

But if the use of the premises is restricted to "saloon purposes" a contrary result has been reached. *Greil Bros. v. Mabson*, 179 Ala. 444; *Kahn v. Wilhelm*, 118 Ark. 239; *Hooper v. Mueller*, 158 Mich. 595; *Doherty v. Eckstein Co.*, 115 Miscel. (N. Y.) 175 (Volstead act); *Stratford v. Seattle Brewing Co.*, 94 Wash. 125. But see *O'Byrne v. Henley*, 161 Ala. 620; *Standard Brewing Co. v. Weil*, 129 Md. 487; *Houston Ice Co. v. Keenan*, 99 Tex. 79; *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94; *Hecht v. Acme Coal Co.*, 19 Wyo. 18. Compare *Goldberg v. Callender*, 113 Atl. (Conn.) 170.

Cases are collected in 19 L. R. A. N. S. 964 note; 23 L. R. A. N. S. 497 note; 34 L. R. A. N. S. 773 note; L. R. A. 1917 C 935 note.

See *McCullough Realty Co. v. Laemmle Film Service*, 181 Iowa 594; *Conklin v. Silver*, 187 Iowa 819; *Taylor v. Finnigan*, 189 Mass. 568; *McMorran Milling Co. v. Little Co.*, 201 Mich. 301; *Adler v. Miles*, 69 Miscel. (N. Y.) 601; *Abbaye v. United States Motor Co.*, 71 Miscel. (N. Y.) 454; 7 A. L. R. 836 note.

PARKS v. BOSTON

15 Pick (Mass.) 198. 1834.

THIS was a complaint presented to the Court of Common Pleas, praying that a jury might be empannelled to assess the damages sustained by the complainant in consequence of the taking of 313 square feet of land by the mayor and aldermen of Boston, on July 13, 1829, for the purpose of widening Doane street in that city.

The respondents admitted the taking of the land, but traversed the allegation in the complaint, that the complainant was damaged in his property thereby, and tendered an issue thereon, which was joined.

In the course of the trial, the respondents, in order to show, that the complainant was not entitled to recover the full value of the land at the time when it was taken, and that they were liable to pay one Enoch Patterson, who had preferred a complaint against them, for the loss of the use of the land taken, from the time when it was taken until January 1, 1832, proved the execution of a lease of the land taken and of other lands, which was made by the complainant to Patterson before the taking of the land, by virtue of which lease Patterson was entitled to hold such lands for the term of three years from January 1, 1829, at an annual rent of \$725; and thereupon they contended, that, inasmuch as the complainant would be entitled to recover such rent of Patterson during the continuance of the lease, a deduction should be made by the jury on this account, from the value of the land. The judge instructed the jury, that part of the land leased having been taken by law for the use of the public, without the consent of the complainant or Patterson, the lease was thereby determined; that the city would not be liable to pay Patterson any damages on account of his having covenanted to pay the rent to the complainant; and that the complainant was entitled to recover against the city the full value of the land taken, as if it had not been leased.

To this ruling the respondents excepted.

The jury returned a verdict for the complainant, and assessed the damages at the sum of \$8800.

SHAW C. J. delivered the opinion of the Court. This case comes before the Court upon exceptions taken by both parties, to some of the decisions of the learned judge who tried the cause in the court below, in point of law.

We shall first consider the exceptions taken on the part of the city.

This claim for land taken to widen and improve streets in this city, and the mode of seeking the remedy therefor, depends upon the provisions and the construction of several statutes.

By *St.* 1821, c. 109, § 8, being the act providing for the administration of justice in the county of Suffolk, passed contemporaneously with the act incorporating the city, it was provided that the Court of Common Pleas, for the county of Suffolk, should have all the jurisdiction before that time vested in the Court of Sessions with regard to streets and ways.

By *St.* 1804, c. 73, authority is given to the selectmen of Boston, (afterwards transferred to the mayor and aldermen by the city charter,) to lay out and widen streets, to take land therefor and remove buildings; and the owner or owners of the land and buildings, that shall be so taken or removed, shall recover recompense for the damages, which he or they may thereby sustain, to be adjusted by agreement, or as shall be ordered by the justices of the Court of General Sessions of the Peace, upon an inquiry into the same by a jury to be summoned for that purpose, to be drawn &c. The *St.* 1799, c. 31, § 3, which had made substantially the same provision, directed, that the damages should be ascertained, determined and recovered in the way and manner pointed out by *St.* 1786, c. 67, entitled "An act directing the method for laying out highways."

The act already referred to, *St.* 1821, c. 109, § 8, by which the authority of the Court of Sessions was transferred to the Court of Common Pleas, so far altered the old mode of proceeding before a sheriff's jury as to direct, that such trial should be had at the bar of the Court of Common Pleas, in the same manner as other civil causes are there tried, by the jurors there returned and empanelled; and that the jury, to whom such cause might be committed, should be taken to view the place in question, if either party should require it.

It has heretofore been decided by this Court, and apparently upon much consideration, in the case of *Ellis v. Welch*, 6 Mass. R. 246, that the term "owner" in this statute, includes every person having an interest in real estate capable of being damnified by the laying out of a street, through or over it, and is equivalent to the description of, "any person damaged in his property," as used in the general act regulating the laying out of highways, *St.* 1786, c. 67, § 4.

This construction appears to us to be entirely reasonable and necessary. It is a remedial act, intended to carry into execution that most equitable provision of the constitution, "that whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." To give effect to this highly important and equitable provision, it is necessary to construe the term *property* as including every species of valuable vested interest. In the same case it was decided, that a tenant for years at an annual rent, was an owner, within the meaning of the statute, and

that the lessee and the landlord are each entitled to compensation according to the nature and magnitude of the damages, which they may have respectively sustained.

There seems to be no other equitable or practicable mode of executing this statute. There may be a lease for years to one, with a life estate to another, and a vested remainder in a third, each of whom will sustain damage, by taking a part of the estate; but as those interests are entirely distinct, neither of these parties could claim the damages, or equitably receive the compensation due to another. Such compensation therefore must be apportioned among them, according to the relative magnitude and value of their respective interests, and of course, there must be a separate inquiry and a separate award of damages, upon the complaint and application of each. Again, there seems to be great difficulty in discovering any principle, upon which it can be legally held, that the taking part of an estate which is under lease, for a public easement, will put an end to the lease, or deprive the lessee of his term, or exempt him from his liability to pay the reserved rent.

It may happen, that where a lease is held for a short term, at a rack rent, equal to the annual value of the estate, and especially where so large a part of the estate is taken for the public easement, as to render the tenement unfit for the uses for which it was leased, it would be more convenient for all parties to consider the lease at an end, and to permit the whole damage to be recovered by the landlord. If this should be desired, by the landlord and tenant respectively, nothing would prevent them from accomplishing it, before the way is finally laid out and recorded, by a surrender of the term by the tenant and an acceptance thereof by the landlord. But the point under consideration is, whether such determination of the term is affected by the operation of law, without such surrender.

There are many cases, in which the tenant has a highly valuable and beneficial interest in his term, as where he holds it for a long term, on a building lease, at a moderate ground rent, or at a mere nominal rent, or where a large fine has been paid upon the commencement or renewal of the lease. It may be, that notwithstanding the estate is diminished in quantity by the taking for public use, it is not diminished in value, but even increased in value to the lessee, for the purposes of business to which he may have occasion to apply it. Upon what principle can it be held, that in any of these cases, the term is *de facto* extinguished and annihilated by the taking of a part, perhaps a small and unimportant part, of the leased property, for public use?

But I presume this supposed effect of determining the term is thought to result from the other branch of this opinion, which is, that by the act of thus taking away a part of the leased estate,

the tenant would be exempted from the payment of the reserved rent, and therefore the landlord ought to receive an equivalent in his compensation from the public. If such were the effect, the inference would undoubtedly be correct.

But upon what principle can it be maintained, that a lessee under such circumstances would be exempted from the payment of the stipulated rent? The lessee takes his term, just as every other owner of real estate takes title, subject to the right and power of the public to take it or a part of it, for public use, whenever the public necessity and convenience may require it. Such a right is no incumbrance; such a taking is no breach of the covenant of the lessor for quiet enjoyment. The lessee then holds and enjoys exactly what was granted him, as a consideration for the reserved rent; which is, the whole use and beneficial enjoyment of the estate leased, subject to the sovereign right of eminent domain on the part of the public. If he has suffered any loss or diminution in the actual enjoyment of this use, it is not by the act or sufferance of the landlord; but it is by the act of the public, against whom the law has provided him an ample remedy. If he is compelled to pay the full compensation, for the estate actually diminished in value, this is an element in computing the compensation which he is to receive from the public. In this view, it becomes unimportant, in settling the principle we are now discussing, whether the taking for public use diminishes the leased premises, little or much, in quantity or in value; all this will be taken into consideration in assessing the damages, which the lessee may sustain.

But it was contended on the part of the complainant, and authorities were cited to show, that where a covenant is to do any act, lawful at the time the covenant is made, but which becomes unlawful afterwards, the covenantor is excused from the performance. This principle is correct, but I cannot perceive that it has any application to the present case. For instance, if one should covenant with the owner of a lot of land to build a warehouse upon it, at a future time, and before the time a street should be laid over it, so that it would become unlawful to build upon it, the covenant would be repealed; and it would probably follow, that the corresponding covenant on the other side to pay for such building would be considered repealed also. But nothing renders it unlawful for the tenant in the present case, to use, occupy and enjoy the leased premises, subject only to the public easement. To the extent of the property not taken he has still the beneficial use; if its value is diminished by the taking, to that extent he has his compensation from the public, and thus he has still an equivalent for his rent paid.

Upon these grounds, we are of opinion, that the lease from the complainant to Patterson was not dissolved by the act of taking part of the leased premises to widen a public street; that Patterson, notwithstanding such taking, continued liable to pay the reserved rent,

during the term which remained unexpired; and that the jury should have been instructed to take that fact into consideration, in estimating the damages which the complainant had sustained, by such taking.¹

PARADINE v. JANE

Aleyn 26. 1647.

IN debt the plaintiff declares upon a lease for years rendering rent at the four usual feasts; and for rent behind for three years, ending at the Feast of the Annunciation, 21 Car., brings his action: The defendant pleads, that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, hath invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 of July, 18 Car., till the Feast of the Annunciation, 21 Car., whereby he could not take the profits; whereupon the plaintiff demurred, and the plea was resolved insufficient.

1. Because the defendant hath not answered to one quarter's rent.

2. He hath not averred that the army were all aliens, which shall not be intended, and then he hath his remedy against them; and Bacon cited 33 H. 6, 1 e, where the jailer in bar of an escape pleaded, that alien enemies broke the prison, &c., and exception taken to it, for that he ought to show of what country they were, viz. Scots, &c.

3. It was resolved, That the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. Dyer, 33 a; Inst. 53 d, 283 a; 12 H. 4, 6. So of an escape. Co. 4, 84 b; 33 H. 6, 1. So in 9 E. 3, 16, a *supersedeas* was awarded to the justices, that they should not proceed in a *cessavit* upon a cesser during the war, but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenants to repair a house, though it be burned by lightning, or thrown down by enemies,

¹ The statement of facts is abridged and part of the opinion is omitted. *Stubbings v. Evanston*, 136 Ill. 37; *Olson Land Co. v. Alki Park Co.*, 63 Wash. 521 (*semble*) accord. Compare *Folts v. Huntley*, 7 Wend. (N. Y.) 210; *Schmid v. Thorsen*, 89 Oreg. 575.

Where part of the leased premises was taken by eminent domain the rent was apportioned in *Commissioners v. Johnson*, 66 Miss. 248; *Biddle v. Hussman*, 23 Mo. 597. See *Baltimore v. Latrobe*, 101 Md. 621; *Duham v. Mermod Co.*, 211 N. Y. 364, 368; *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357.

yet he ought to repair it. Dyer, 33 a; 40 E. 3, 6 h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations. This reservation then being a covenant in law, and whereupon an action of covenant hath been maintained (as Roll said), it is all one as if there had been an actual covenant. Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burden of them upon his lessor; and Dyer 56, 6, was cited for this purpose, that though the land be surrounded or gained by the sea, or made barren by wild-fire, yet the lessor shall have his whole rent: And judgment was given for the plaintiff.¹

IZON v. GORTON AND ANOTHER

5 Bing. N. C. 501. 1839.

TINDAL C. J.² The Defendants in this case being tenants from year to year to the Plaintiff of the upper floors of a warehouse, at a rent payable quarterly, a fire broke out in the Defendants' rooms accidentally, in the middle of a quarter; by means of which the floors were consumed, and the Defendants' rooms so damaged that they became altogether untenable until the Plaintiff had completed their repairs after about seven months interval from the time of the fire.

Two questions have arisen between the parties upon this state of facts; viz., first, whether the Defendants are liable to the payment of any, and what rent, after the termination of the quarter which was current at the time of the fire (up to the end of which quarter the rent has been paid into Court); and secondly, if liable to rent at all, whether it can be recovered in an action for use and occupation.

¹ *Taverner's Case*, Dyer 56a, was this "A man makes a lease for years of land and of a stock of sheep, rendering certain rent, and all the sheep died; it was asked upon the indenture of Richards le Taverner, Whether this rent might be apportioned? And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea gain upon part of the land leased, or part is burned with wildfire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder: otherwise is it if part be recovered or evicted by an elder title, then it is apportionable. And of this opinion were BROMELEY, PORTMAN, HALES, Sergeants, LUKE, Justice, BROOKE, and several of the Temple. But MARVYN, BROWN, Justices, TOWNSHEND, GRIFFITH, and FOSTER *e contra*; but all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by MORE, in the following Lent. And it seemed to him, and to BROOKE, HADLEY, FORTESCUE, and BROWN, Justices, that the rent should be apportioned, because there is no default in the lessee."

² The statement of facts is omitted.

Upon the first point, we can see no legal ground for holding that the relation of landlord and tenant between these parties was determined by the consumption of the premises by fire. If there had been an agreement in writing between the parties for a term of years, no question could have been made, but that the term of years still existed; and a tenancy from year to year, until it is determined by a notice to quit, is, as to its legal character and consequences, the same as a term for years: upon the facts stated in this case it must stand admitted, that the tenancy was not determined by any regular notice to quit: and the case of *Baker v. Holtpzaffell* is a direct authority, that a tenancy for a term, under an agreement, not being an instrument under seal, is not determined by a fire during the continuance of the tenancy. We think, therefore, the Defendants continued tenants to the Plaintiff until such tenancy was put an end to by the Plaintiff's letting of the premises to a stranger, viz. at *Lady-day* 1836, and that they are liable to rent up to that day.

The remaining question is, whether the Defendants are liable in this form of action. The statute 11 *G* 2. *c.* 19. enables landlords "to recover a reasonable satisfaction for lands, &c. held *or* occupied by the defendant in an action on the case, for the use and occupation of what was so held *or* enjoyed;" from which it seems to follow, that if there is an actual *holding*, and the power to occupy or enjoy is given by the landlord to the tenant, so far as depends on the landlord, the action is maintainable. Here, nothing was done by the landlord to take away the continuance of the occupation or enjoyment by the tenant: for it would, as it appears to us, be unreasonable to hold that the landlord's act in replacing the floor, and repairing the walls of the Defendants' rooms, amounted to an eviction: and though in the case above cited, where it was held that the action for use and occupation would lie, some stress was placed by the Court upon the fact, that the land was still in existence and there was no offer on the part of the Defendant to give it up; so it might be argued in the present case; the space enclosed by the four walls, still continued as marked out by them. If the landlord rebuilds, and the tenant chooses to re-enter and to continue his occupation of the new building, there seems nothing to prevent him, as no notice to quit had been given on either side; and if so, the obligation of each of the parties must be reciprocal, and the tenant must make satisfaction for the rent. The cases referred to in the argument, in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the wrongful act or default of the landlord himself; neither of which circumstances occur in this case.

Upon the whole, we think the Plaintiff is intitled to judgment for 109*l.* 10*s.*

Judgment for Plaintiff.

WOMACK v. McQUARRY

28 Ind. 103. 1867.

FRAZER, J. The appellant sued the appellee to recover rents. The facts were that the appellant, on the 7th of *March*, 1864, owned a saw-mill and a woolen factory. The two buildings were separate, but side by side. The machinery of both was propelled by water drawn from the pool of one dam, but each had its separate fore-bay and water wheel. On that day, the saw-mill and one room of the factory building (for a carpenter shop,) which had an entrance from the saw-mill, were leased to the appellee for three years, the appellee agreeing to pay quarterly therefor the sum of three hundred dollars per annum. The appellee took possession of the leased property on the day of the contract; and while in possession, on the 9th of June following, both buildings, with their contents, except the water wheels, basements and such parts as were protected by the water, were consumed by a fire, originating in the carpenter shop. In December following, Green & Co., real estate agents, caused an advertisement to be published in a newspaper offering the property for sale. Green & Co. were authorized by the appellant to sell the property, only subject to the appellee's lease, and the appellant had no part in framing or publishing the advertisement. The property, however, was not sold. After the conflagration, neither party exercised any manual control of the property leased.

The question presented is, whether, under the circumstances, the plaintiff can recover rent for the premises after the destruction of the buildings by fire? The general doctrine that in the absence of a contract to rebuild, a tenant agreeing expressly to pay rent is not relieved of that obligation by the accidental destruction of the building leased, unless it is so provided in the contract, is so well established and understood that it is needless to refer to the authorities supporting it. There are, however, some comparatively recent cases in which an exception to this rule has been held to exist. *Winton v. Cornish*, 5 Ohio 477; *Kerr v. Merchant's Exchange Co.*, 3 Ed. Ch. 315; *Stockwell v. Hunter*, 11 Met. 448; *Graves v. Berdan*, 26 N. Y. 498. This exception applies only to cases where the demise is of part of an entire building, as a cellar or upper room; and it is founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment demised, and that when that enjoyment becomes impossible, by reason of the destruction of the building, there remains nothing upon which the demise can operate. The leading one of those cases, *Winton v. Cornish*, presented strong reasons of justice and policy for the ruling; the lessee of a lower room, cellar, or part of a building of several stories, in that case, interposing to prevent the erection of a new structure by

the landlord. Had he succeeded, a valuable lot in Cincinnati must, in consideration of a yearly rental, probably bearing no reasonable proportion to its value, have remained for over two years unimproved. That no such consequence could have been intended by the parties, it is not easy to controvert. We are satisfied to follow the doctrine of these cases. It is, in the case before us, applicable to the carpenter shop, but not to the saw-mill. It results that the lessee must pay rent for the latter. As the contract was entire, there must be an abatement of the rent on account of the destruction of the factory. Justice can only be done in the case by apportioning the rent, as in cases where a part of the premises is lost to the tenant by the act of God, or he is evicted of part by title paramount. *Taylor's Landlord and Tenant*, §§ 385, 386.

The judgment is reversed, with costs, and the cause remanded for a new trial.¹

WARE AND ANOTHER v. HOBBS

222 Mass. 327. 1916.

CROSBY, J. This is an action brought to recover a payment of \$600 made on March 14, 1913, by the plaintiffs as lessees under a written lease from the defendant of "the Hotel Crowninshield with Annex and maids' cottage and grounds at Clifton, in the Town of Marblehead, Massachusetts," together with certain personal property therein described. The term of the lease was for two years and ten months from the second day of January, 1911, at a rental of \$2,200 for the first ten months and \$2,400 for each of the two following years, called in the lease the "second" and "third" years. The lease provided that the rent for the third year should be paid in four instalments of \$600 each on the following days respectively: December 1, 1912; June 1, 1913; July 1, 1913; and August 1, 1913; and at the rate of \$2,400 per annum for such further time as the lessees occupied the premises after October 31, 1913. The instalment of rent due on December 1, 1912, was paid on March 14, 1913. The buildings on the premises were totally destroyed by fire on April 3, 1913; and on April 16, 1913, the lessor elected to terminate the lease and notified the plaintiffs to that effect.

There was evidence to show that the leased premises were used

¹ See *Post v. Brown*, 142 Tenn. 304.

The authorities are collected in 6 Harv. Law Rev. 125-130; 2 Tiffany, Real Prop., 2d ed., pp. 1497-1499; 2 Williston, Contracts, §§ 944, 945. For statutes, see 1 Tiffany, Landl. and Ten., pp. 1211 *et seq.*

On recovery of rent payable in advance for premises subsequently destroyed by accident, see *Harvey v. Weisbaum*, 159 Cal. 265; *Carlton Elevator Co. v. Klahn*, 43 S. D. 76; *Porter v. Tull*, 6 Wash. 408; 33 L. R. A. N. S. 540 note.

by the lessees as a summer hotel; that the hotel had no heating system therein, and that the buildings could not be used as a hotel during the winter months. The judge of the Superior Court, Fox, J., before whom the case was tried, ordered a verdict for the defendant subject to the plaintiffs' exceptions, and reported the case with the stipulation that, if "upon the competent and admissible evidence, and upon the admitted facts . . . the plaintiffs had a right to go to the jury, then judgment is to be entered forthwith for the plaintiffs for six hundred dollars (\$600) and interest from the date of the writ; otherwise judgment for the defendant is to be entered upon the verdict."

At common law a lessee of premises which are accidentally destroyed after the making of the lease cannot be relieved against an express covenant to pay rent in the absence of a stipulation to that effect. *Kramer v. Cook*, 7 Gray, 550. In some States this rule has been modified by statute so that the tenant is relieved from the payment of rent or is allowed a reduction thereof when the premises are accidentally destroyed without his fault.¹ The lease in the case at bar contains the usual proviso that if the buildings on the premises or any part thereof shall be damaged by fire or other unavoidable casualty so as to be unfit for use and occupation, then "the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injury sustained, shall be abated until the said premises shall have been duly repaired and restored by the lessor," or, in case the buildings are destroyed, then at his election the lessor may terminate the lease.

The question is: In what manner is "a just and proportional part" of the rent reserved to be abated in accordance with this provision of the lease? The plaintiffs contend that the payment due December 1 and made on March 14 was so made before they had had any valuable use of the premises and was in effect a payment in advance of the summer season and before the hotel would yield any income to the lessees; and that the words "a just and proportional part thereof" do not refer to the portion of the term which had expired before the buildings were destroyed, but that in determining what is a just and proportional part of the rent to be abated the fact that the lessees could receive no income or benefit from the hotel except during the summer months is to be considered, and for that reason the payment of the rent due in December is to be treated in substance as an advance payment. It is settled that under such a provision in a lease a just and proportional part of a payment made in advance may be recovered back in case of the destruction of the premises during the term. In *Rich v. Smith*, 121 Mass. 328. the tenant, for three years in advance, had paid the rent for a building leased by him; the lease contained a provision similar to that in the case at bar; the building was destroyed by

¹ See note to preceding case.

fire before the term had expired; and the lessor elected not to rebuild. It was held that the lessee was entitled to recover back a proportional part of the rent so paid in advance.

We are of opinion that the words "just and proportional" refer to the period of occupancy and not to the value of the use to the tenant, and that the rent to be abated is to be ascertained according to the portion of the period of possession which has expired; and the fact that the lessees could not have carried on the business of keeping a summer hotel when the December instalment of rent became due and was paid is an immaterial circumstance. The proper interpretation of the contract is that when the lessor exercises his election to terminate the lease, then there is to be a just and proportional abatement of rent for the unexpired term because of the inability of the tenant longer to occupy the premises. See *R. L. c. 129, §§ 8, 9*; *Weston v. Weston*, 102 Mass. 514; *Faxon v. Jones*, 176 Mass. 138.

When the fire occurred on April 3, 1913, the first five months of the third year under the lease had expired, and when the instalment of rent of \$600 due on December 1, 1912, was paid on March 14, 1913, the lessees had been in possession and occupancy of the premises under the third year of the lease from November 2, 1912, and continued in such possession until April 3, 1913, a period of five months, which, at a rental at the rate of \$2,400 a year as provided by the terms of the lease, would equal \$200 a month and would amount to \$1,000 for the time actually occupied by them during the last year of the term.

In view of these facts it cannot be found that the rent paid on March 14, 1913, was paid in advance, but it is to be considered as having been paid under the terms of the lease on account of the occupancy of the premises from November 2, 1912, to the date of the fire. The rent under the lease was not made payable at regular intervals, but, with the exception of the December payment, became due on the first days of June, July and August. Still this circumstance cannot affect the interpretation which we have put upon the language of the lease. The dates fixed upon for the payment of the rent during the summer months apparently were for the convenience of the lessees who would be expected to have an income from the hotel business during those months.

In accordance with the terms of the report the entry must be

*Judgment for the defendant on the verdict.*¹

¹ See *Cary v. Whiting*, 118 Mass. 363; *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465.

CIBEL AND HILL'S CASE

1 Leon. 110. 1588.

A LEASE was made of a certain house and land rendering rent, and another sum, *Nomine pænæ*; and for the *Nomine pænæ* the lessor brought an action of debt. The lessee pleaded, that the lessor had entered into parcel of the land demised, upon which they were at issue, and found for the plaintiff; and now the lessor brought debt for the rent reserved upon the same lease; to which the defendant pleaded, *ut supra, scil.* an entry into parcel of the land demised: And issue was joined upon it; And one of the jury was challenged, and withdrawn, because he was one of the former jury: And the issue now was, whether the said Cibel, the lessor, *expulit et amovit et adhuc extra tenet*, the said Hills. And to prove the same, it was given in evidence on the defendant's part, that upon the land demised there was a brick-kiln, and thereupon a little small cottage, and that the lessor entered, and went to the said cottage and took some of the bricks and untiled the said cottage: But of the other it was said, that the lessor had reserved to himself the bricks and tiles aforesaid which in truth were there ready made at the time of the lease made, and that he did not untile the brick-kiln house, but that it fell by tempest, and so the plaintiff did nothing but came upon the land to carry away his own goods: And also he had used the said bricks and tiles upon the reparation of the house. And as to the *extra tenet*, which is parcel of the issue, the lessor did not continue upon the land, but went off it, and relinquished the possession: But as to this last point, it seemed to the court, that it is not material if the plaintiff continued his possession there or not, for if he once doth anything which amounts to an entry, although that he depart presently, yet the possession is in him sufficient to suspend the rent, and he shall be said, *extra tenere* the defendant the lessee, until he hath done an act which doth amount to a re-entry. And afterwards to prove a re-entry, it was given in evidence on the plaintiff's part, that the defendant put in his cattle in the field where the brick-kiln was, and that the cattle did stray into the place where the defendant had supposed that the plaintiff had entered. And by ANDERSON, Justice the same is not any re-entry to revive the rent, because they were not put into the same place by the lessee himself, but went there of their own accord. And such also was the opinion of Justice PERIAM.¹

¹ The landlord is entitled to rent payable in advance even though he later evicts. *Hunter v. Reiley*, 43 N. J. L. 480. See *Giles v. Comstock*, 4 N. Y. 270; *Gugel v. Isaacs*, 21 App. Div. (N. Y.) 503, aff'd. in 162 N. Y. 636.

Contra, *The Richmond v. Cake*, 1 App. D. C. 447; *Sloss v. Brockman*, 171 Ill. App. 465; *Noyes v. Anderson*, 1 Duer. (N. Y.) 342.

Compare *Hall v. Middleby*, 197 Mass. 485; *St. Louis Co. v. Stanton*, 172 Mo. App. 40.

HUNT v. COPE

Cowp. 242. 1775.

ERROR from a judgment of the court of *King's Bench*, in *Ireland*, in an action of *replevin*, brought by the plaintiff, now defendant in error, for taking certain goods of the said *Henry Cope*, out of his dwelling-house, and detaining them, &c.

The defendant, the now plaintiff in error, avowed the taking for rent arrear due by the said *Hunt* to the said defendant, for certain premises in the avowry mentioned.

The plaintiff pleaded 1st, That there was not any rent due to the defendant out of the premises, at the time of the taking, &c. upon which issue was joined. 2dly, That long before the taking of the goods, to wit on the 1st of *April* 1770, the defendant with force and arms unjustly and unlawfully entered upon the garden part of the messuage or tenement in the plaintiff's possession, and did then and there with like force and arms unjustly and unlawfully *break* and *pull down* the roof and ceiling of a *summer-house*, part of the said premises, and tore up the benches therein, by means whereof the plaintiff had been *deprived of the use* of the summer-house, from the said 1st of *April*, 1770, until the day of taking of the said goods, &c.

To this plea the defendant demurred, and the plaintiff joined in demurrer.

The Court of *King's Bench* in *Ireland*, gave judgment upon the demurrer for the plaintiff, whereupon the defendant brought this writ of error to reverse the judgment, and assigned the general errors, and the plaintiff joined in error.

LORD MANSFIELD. The whole question in this case turns upon the pleading; for the rule of law is clear, namely, that to occasion a suspension of the rent, there must be an eviction or expulsion of the lessee. But here the plea states merely a trespass, and no eviction, therefore the plaintiff must recover.

ASTON Justice. I am clearly of the same opinion. The case in *Cro. El.* 341. never received a final determination; and even upon the mooting of it *Fenner* and *Clench* doubted. All the cases in the books suppose the lessee to be put out of possession; therefore merely saying that he was deprived of the enjoyment of the premises is not sufficient, but he must plead that he was evicted. 1 *Lord Raym.* 370. *Clayton* 34. *Hob.* 326. *Reynolds* versus *Buckle*.

LORD MANSFIELD. The defendant certainly should have pleaded *eviction*, and then the facts that are now stated might have been sufficient for the jury to have found a verdict in his favour.

MR. JUSTICE WILLES and **MR. JUSTICE ASHHURST** were of the same opinion.

*Judgment reversed.*¹

¹ *Roper v. Lloyd*, T. Jones 148, accord. See *Bennett v. Bittle*, 4 Rawle (Pa.) 339; 1 *Tiffany*, Real Prop., 2d ed., pp. 201-203. Compare *Hoeveler v. Fleming*, 91 Pa. 322.

SMITH v. RALEIGH

3 Camp. 513. 1814.

ASSUMPSIT for the use and occupation of a house and garden. Plea, the general issue.

It appeared, that after the defendant had agreed to take the premises at an entire rent, and possession had been delivered to him, the plaintiff railed off a part of the garden, and built a privy upon it, for the use of a number of his other tenants. The defendant thereupon returned the keys to him.

LORD ELLENBOROUGH ruled, that this amounted to an eviction from part of the demised premises; which, the taking being single, and the rent entire, he considered a complete answer to the action.

*Plaintiff nonsuited.*¹

CHRISTOPHER, EXECUTOR v. AUSTIN

11 N. Y. 216. 1854.

APPEAL from a judgment of the New York Common Pleas. The action was brought by Thomas Vermilya in that court to recover for the use and occupation of a dwelling-house and three lots of ground from the 1st of May, 1847, to the 1st of May, 1848. The cause was tried before Judge *Woodruff*, without a jury. He found "that the defendant, by agreement not under seal, hired from the plaintiff the demised premises, from the 1st of May, 1847, to the 1st of May, 1848, at the rent of two hundred dollars, payable quarterly, and entered into the possession thereof under the agreement; that afterwards, and before any rent became payable, the plaintiff entered upon the demised premises and evicted the defendant from a part thereof, which eviction continued during the whole residue of the term; that notwithstanding such eviction, the defendant voluntarily continued to enjoy, use and occupy the residue of the premises until the expiration of the term on the first of May, 1848; that after the first of February, 1848, the plaintiff prosecuted the defendant in an action of assumpsit upon the agreement, to recover the three quarters' rent, due on that day; in such action the defendant interposed as a defence the eviction of him by the plaintiff from a

¹ This case was recognized by Dallas, J., in *Stokes v. Cooper*, Worcester Lent Assizes, 1814, in which the rule was laid down, that after eviction from part, the landlord cannot recover upon the original contract, and the tenant, by giving up possession of the residue, is entirely discharged; but that if the tenant, after the eviction, continues in possession of the residue, he may be liable upon a *quantum meruit*. Vide *Dalston v. Reeve*, Ld. Raym. 77; *Clun's Case*, 10 Rep. 128. — REP.

See *Tomlinson v. Day*, 2 Brod. & B. 680; s. c. 5 Moore, 558.

part of the demised premises, and upon trial of this issue a verdict was rendered in favor of the defendant, upon which judgment was entered." The judge decided as matter of law upon said facts, that such wrongful eviction of the defendant from a part of the premises, suspended the rent, and that the plaintiff could not recover for the use and enjoyment of the residue of the premises while such eviction continued; and therefore, whether the record and judgment in the former action were or not a bar to a recovery for the use and occupation from May 1st, 1847, to February 1st, 1848, that the eviction having continued during the whole term, this action for a compensation for the use and occupation of the residue of the premises, could not be sustained; and directed judgment in favor of the defendant. On an appeal by the plaintiff, the Court of Common Pleas, at General Term, affirmed the judgment. The plaintiff appealed to this court.

During the pendency of the suit, Vermilya, the plaintiff, died, and the suit was continued in the name of Christopher, his executor.

PARKER, J. The judge found the fact that after the leasing of the premises for one year, viz., from the first day of May, 1847, to the 1st of May, 1848, by a written lease, not under seal, at a rent of \$200, payable quarterly, and after the defendant had entered into possession under such agreement, before any rent had become payable, the plaintiff entered upon the premises and evicted the said tenant from a part thereof, which eviction continued during the whole residue of the term for the hiring.

It is contended by the plaintiff's counsel, that although such an eviction would be a bar to an action on the agreement to pay rent, yet that it is no bar to an action under the Statute to recover a reasonable sum for the use and occupation, if the tenant continue to occupy a portion of the premises after such eviction from a part. There is no reason for such a distinction, nor can it be sustained by authority. The rule is, that if the landlord enter wrongfully upon or prevent the tenant from the enjoyment of a part of the demised premises, the whole rent is suspended till the possession is restored. *The Fitchburg Corporation v. Melven*, 15 Mass. R. 268. Nelson, C. J., said in *Lawrence v. French*, 25 Wend. 445, "his (the landlord's) title is founded upon this, that the land leased is enjoyed by the tenant during the term: if, therefore, he be deprived of it, the obligation to pay ceases." And Spencer, Senator, in *Dyett v. Pendleton*, 8 Cowen, 731, states as the reason for the rule, "as to the part retained, this is deemed such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent." It would be a palpable evasion of the rule and of the penalty the law imposes upon the landlord for a wrongful eviction, to hold that he may recover for use and occupation on a *quantum meruit*, when he is not permitted to recover on the agreement itself.

The exception to the rule is where a part is recovered by title paramount to the lessor's; for in that case he is not so far considered in fault, as that it should deprive him of a return for the part remaining. *Lawrence v. French*, 25 Wend. 445; 8 Bac. Abr. 514, tit. Rent, L.; Gilbert on Rents, 173. And where the tenant enters, but is prevented from obtaining the whole of the premises, by a person holding a part under a *prior lease* executed by the landlord, it has been placed upon the same footing as an eviction by title paramount, and the landlord has been permitted to recover for use and occupation on a *quantum meruit*. *Lawrence v. French*, 25 Wend. 443; *Ludwell v. Newman*, 6 Term R. 458; *Tomlinson v. Day*, 2 Brod. & Bing. 680.

I know the rule has been laid down in some of the elementary books, Story on Cont. § 657; Taylor, Lan. & Ten. 443, to be that when the rent is entire and the landlord evicts the tenant during his term out of part of the premises, he may abandon the residue, and is not chargeable for the occupation of any part; but that if the tenant still continue to occupy the residue, he is chargeable upon a *quantum meruit*. The rule has been thus stated on the authority of two *nisi prius* cases, viz.: *Smith v. Raleigh*, 3 Camp. 513, and *Stokes v. Cooper*, a case not reported but referred to in a note to the same case, as having been decided by Dallas, J., at the Worcester Lent Assizes. In *Smith v. Raleigh* it appeared the tenant abandoned the premises after being evicted from a part, but the decision was not put by Lord Ellenborough on that ground, and I think the tenant would equally have been entitled to judgment, if he had remained in possession of the residue. The only case that can be found favoring the idea that a tenant who remains in possession of the residue during the term, after an eviction from part, is chargeable, is that of *Stokes v. Cooper*, above cited. And that is not sufficiently reported to enable us to know what were the facts of the case; and if it were so, it would be entitled only to the weight due to a hastily made decision at the circuit. If the decision was what it is claimed to have been, it is at war with the rule of law as it has been generally stated in well-considered cases. The consequence of an eviction from part is not merely a discharge of the tenant from the rent, provided he abandons the residue, but it is a discharge of the tenant from any rent or liability for the occupation of the residue during the term of hiring. In *Dyett v. Pendleton*, 8 Cowen, 731, Spencer, Senator, said: "This distinction, which is as perfectly well settled as any to be found in the books, establishes the great principle that a tenant shall not be required to pay rent, *even for the part of the premises which he retains*, if he has been evicted from the other part by the landlord;" and the rule as recognized in other cases and generally stated in the treatises is, that an eviction from part will operate as a suspension of the whole. 24 Wend. 445; Comyn's Land. & Ten. 524; 2 Saund. Pl. & Ev. 630.

I suppose it is the right of the tenant under such circumstances to remain in possession of the residue during the term, and that he can neither be made liable on the original lease nor in an action for use and occupation, unless he holds over after the expiration of his term.

If I am right in this conclusion, the wrongful eviction of the defendant was a bar to the plaintiff's right of recovery for the use of the premises in any form, and it is not necessary to consider whether, or to what extent, the litigation of the same subject-matter or of three fourths of it at least, in the former action, would have constituted a good defence.

There are no questions properly before us for examination, except those presented by the bill of exceptions. We cannot review the decision of the court below, on the motion to set aside the judgment, on the grounds of surprise and irregularity. These were matters of discretion, and did not involve the merits. I think the judgment of the court below should be affirmed.

GARDINER, C. J., also delivered an opinion in favor of affirmance.
*Judgment affirmed.*¹

DYETT v. PENDLETON

4 Cow. (N. Y.) 581. 8 Cow. (N. Y.) 727. 1825. 1826.

COVENANT for rent upon a lease dated *October 15th*, 1818, given by the plaintiff to the defendant, for the term of two, three, five, or eight years, but not for a less term than two years, of two rooms, or the whole of the second floor, and two rooms chosen by the defendant on the third floor of a certain house or store in Beaver street, corner of William street, in the city of New York, at a rent of \$425 *per annum* which the defendant covenanted to pay, and entered into possession of the demised premises.

The defendant pleaded, 1st, *non est factum*;

2. That before any of the rent became due, to wit, on, &c. the plaintiff entered upon the demised premises, and ejected, expelled, put out and amoved the defendant, and kept and continued him so ejected, expelled, and amoved from thence hitherto.

¹ And see *New York Dry Goods Store v. Pabst Brewing Co.*, 112 F. R. 381; *Skaggs v. Emerson*, 50 Cal. 3; *Smith v. Wise*, 58 Ill. 141; *Leishman v. White*, 1 All. (Mass.) 489; *Smith v. McEnany*, 170 Mass. 26; *Kuschinsky v. Flanigan*, 170 Mich. 245; *Powell v. Merrill*, 92 Vt. 124; *Burn v. Phelps*, 1 Stark. 94; 41 L. R. A. n. s. 430 note. But compare *Warren v. Wagner*, 75 Ala. 188, 202-203; *Anderson v. Winton*, 136 Ala. 422; *Miller v. Southern Ry. Co.*, 108 S. E. (Va.) 838.

Material interference by landlord with access to leased premises. *Smith v. Tennyson*, 219 Mass. 508; *Pridgeon v. Excelsior Boat Club*, 66 Mich. 326; *Hall v. Irvin*, 78 App. Div. (N. Y.) 107; *Emison v. Lowry*, 3 S. D. 77; 12 A. L. R. 175 note.

Replication, denying the expulsion and issue.

The cause was tried at the *New York Circuit*, *June 19th 1823*, before EDWARDS, C. Judge.

On the trial, the counsel for the defendant produced receipts for rent to the *1st February, 1820*, and offered to prove that about that time the plaintiff introduced into the house demised, lewd women or prostitutes, and continued this practice from time to time and at sundry times, keeping and detaining them in there all night for the purpose of prostitution; that such women would frequently enter the house in the day time, and, after staying all night, would leave it by day light in the morning; that the plaintiff sometimes introduced other men into the house, who, together with him, kept company with the lewd women or prostitutes during the night; that on such occasions, the plaintiff and the women, being in company in certain parts of the house not included in the lease, but adjacent and in the plaintiff's occupation, were accustomed to make a great deal of indecent noise and disturbance, the women often screaming extravagantly so as to be heard throughout the house, and by the near neighbors; and frequently using obscene and vulgar language, so loud as to be understood at a considerable distance; that such noise and riotous proceedings being frequently continued all night, greatly disturbed the rest of persons sleeping in other parts of the house, and particularly in the parts demised; that these practices were matter of conversation and reproach in the neighborhood; and were of a nature to draw, and did draw, odium and infamy upon the house as being a place of ill fame, so that it was no longer reputable for moral or decent persons to dwell or enter there; that all these practices were by the procurement or permission and concurrence of the plaintiff. That the defendant, being a person of good and respectable character, was compelled by the repetition of these practices to leave the house, and did leave it for that cause, about the beginning of *March, 1820*; and did not return. That a respectable man by the name of Fox, to whom part of the house had been underlet, left it for the same cause.

This evidence was objected to, and overruled by the Judge as inadmissible upon the issue; and the defendant's counsel excepted. Verdict for the plaintiff, damages \$362.52.

[Counsel for defendant moved for a new trial but the motion was denied. The opinion of SUTHERLAND, J., is omitted. The case was carried to the Court for Correction of Errors and judgment was reversed by vote of sixteen to six. The opinion of SPENCER, SENATOR, for reversal was as follows:]

SPENCER, Senator. It seems to be conceded that the only plea which could be interposed by the defendant below, to let in the defence which he offered, if any would answer that purpose, was, that the plaintiff had entered in and upon the demised premises, and ejected and put out the defendant. Such a plea was filed; and it

is contended on the one side, that it must be literally proved, and an actual entry and expulsion established; while on the other side it is insisted, that a constructive entry and expulsion is sufficient, and that the facts which tended to prove it, should have been left to the jury. It is true, that "pleading is the formal mode of alleging that on the record, which would be the support or defence of the party on evidence," as defined by Buller, J., in 1 Term Rep. 159; and the same learned judge immediately after draws the correct distinction: "whether the evidence in each particular case is a sufficient foundation for that support or defence, is a question that does not arise upon pleading, but upon the trial of the issue afterwards." In pleading, the legal effect of the facts is stated, not the facts themselves. The form of the plea therefore, does not determine the kind of evidence necessary to establish it. To support a plea that the defendant never promised, he may prove a payment, or a performance of his undertaking, or some matters which excused him from its performance. A very familiar case is presented in the action of trover, which has been partly alluded to on the argument. The plaintiff alleges, that he casually lost the chattel, which the defendant found and converted to his own use. It is very questionable whether, if this were strictly proved precisely as alleged, it would support any action. The proof, however, to sustain it, is either that the defendant tortiously took the chattel, which is itself evidence of a conversion, (and directly contrary to the allegation of finding,) or that the defendant came legally into the possession of the article, and subsequently, on a demand made, refused to restore it to the owner. From this a conversion is implied. But it is plain it is not proved. So in an action against the indorser of a note, the averment of a demand of payment and of notice of non-payment, is supported by evidence of due diligence without actual demand. Again, a promise by the indorser, to pay a note, dispenses with the necessity of proving a demand and notice. There are many similar cases, where the proof of one fact justifies the legal conclusion of another fact. This, then, is a question of principle, whether the evidence offered by the defendant below tended in any manner to establish a constructive entry and eviction by the plaintiff; for if it did, it should have been left to the jury to decide on its effect.

To determine this, it seems only necessary to inquire what are the conditions, express or implied, on which the defendant was to pay the rent. The agreement set forth in the plea contains a covenant that the defendant shall have "peaceable, quiet and indisputable possession" of the premises. This is, in its nature, a condition precedent to the payment of rent; and whether the possession was peaceable and quiet, was clearly a question of fact for the jury. Such conduct of the lessor as was offered to be proved in this case, went directly to that point; and without saying at present,

whether it was or was not sufficient to establish a legal disturbance, it is enough that it tended to that end, and should have been received, subject to such advice as the judge might give to the jury.

The opinion of the supreme court proceeds upon the ground that there must be an actual, physical eviction, to bar the plaintiffs; and in most of the cases cited, such eviction was proved; and all of them show that such is the form of the plea. But the forms of pleading given, and the cases cited, do not establish the principle on which the recovery of rent is refused, but merely furnish illustrations of that principle, and exemplifications of its application. The principle itself is deeper and more extensive than the cases. It is thus stated by Baron Gilbert, in his essay on rents, p. 145: "A rent is something given by way of retribution to the lessor, for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this: that the land demised, is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not. If, therefore, the tenant be deprived of the thing letten, the obligation to pay the rent ceases, because such obligation has its force only from the consideration, which was the enjoyment of the thing demised." And from this principle, the inference is drawn, that the lessor is not entitled to recover rent in the following cases: 1st. If the lands demised be recovered by a third person, by a superior title, the tenant is discharged from the payment of rent after eviction by such recovery. 2d. If a part only of the lands be recovered by a third person, such eviction is a discharge only of so much of the rent as is in proportion to the value of the land evicted. 3d. If the lessor expel the tenant from the premises, the rent ceases. 4th. If the lessor expel the tenant from a part only of the premises, the tenant is discharged from the payment of the whole rent; and the reason for the rule why there shall be no apportionment of the rent in this case as well as in that of an eviction by a stranger, is, that it is the wrongful act of the lessor himself, "that no man may be encouraged to injure or disturb his tenant in his possession, whom, by the policy of the feudal law, he ought to protect and defend."

This distinction, which is as perfectly well settled as any to be found in our books, establishes the great principle that a tenant shall not be required to pay rent, even for the part of the premises which he retains, if he has been evicted from the other part by the landlord. As to the part retained, this is deemed such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent. Here, then, is a case, where actual entry and physical eviction are not necessary to exonerate the tenant from the payment of rent; and if the principle be correct as applied to a part of the premises, why should not the same principle equally apply to the whole property demised,

where there has been an obstruction to its beneficial enjoyment, and a diminution of the consideration of the contract, by the acts of the landlord, although those acts do not amount to a physical eviction? If physical eviction be not necessary in the one case, to discharge the rent of the part retained, why should it be essential in the other, to discharge the rent of the whole? If I have not deceived myself, the distinction referred to settles and recognizes the principle for which the plaintiff in error contends, that there may be a constructive eviction produced by the acts of the landlord.

An eviction cannot be more than an ouster; and we have the authority of Lord Mansfield for saying that there may be a constructive ouster. In *Cowper*, 217, he remarks, "Some ambiguity seems to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary; but that is not so: a man may come in by rightful possession, and yet hold over adversely without a title," &c.

I think the same principle governed an ancient case stated in 1 Rolle's Abridgement, 454, of which the following is a translation: "If the lessee for years of a house, covenant to repair it and leave it in as good plight as he found it, and afterwards certain sparks of fire come from a chimney in the house of the lessor, not very distant, by which the house of the lessee is burned, that shall excuse the performance of the covenant; and the lessee is not bound to rebuild, because it came of the act of the lessor himself." The analogy between the covenant to repair and that to pay rent, is sufficiently strong to justify the application of this case to the latter; and if so, it establishes the doctrine that other acts of the landlord going to diminish the enjoyment of the premises, besides an actual expulsion, will exonerate from the payment of rent.

That is precisely the principle contended for by the plaintiff in error in this case. It is a just and equitable doctrine, and has been so applied in analogous cases. In *Hearn v. Tomlin*, (Peake's N. P. Cases, 192,) which was an action for use and occupation of a wharf, depending on the same principles as an action on a lease for rent,) the defendant had agreed to purchase the wharf under a representation of the plaintiff that he had a lease of it for 13 years, and entered into possession; but on discovering that the plaintiff had a lease for only 3 years, he refused to complete the purchase. Lord *Kenyon* held, that to maintain the action, it must appear that the occupation had been beneficial to the defendant, and that it appearing to have been injurious, the plaintiff could not recover.

We regard cases as containing the evidence of the law, as evincing the rule of decision; and they are consulted to ascertain the principle on which that rule is founded. The review of the cases now made, shows that the principle on which a tenant is required to pay rent, is the beneficial enjoyment of the premises, unmolested in

any way by the landlord. It is a universal principle in all cases of contract, that a party who deprives another of the consideration on which his obligation was founded, can never recover damages for its non-fulfilment. The total failure of the consideration, especially when produced by the act of the plaintiff, is a valid defence to an action, except in certain cases, where a seal is technically held to conclude the party. This is the great and fundamental principle which led the courts to deny the lessor's right to recover rent where he had deprived the tenant of the consideration of his covenant, by turning him out of the possession of the demised premises. It must be wholly immaterial by what acts that failure of consideration has been produced; the only inquiry being, has it failed by the conduct of the lessor? This is a question of fact, and to establish it, the proof offered in this case was certainly competent. I do not feel called upon to say that those facts would have been alone sufficient. Of that the jury were to judge, at least, in the first instance; and the question whether they amounted to a full and complete legal defence, might have been presented in another shape. The only question for our decision is, whether that testimony ought to have been received at all? Believing that it tended to establish a constructive eviction and expulsion against the consent of the tenant; that it tended to prove a disturbance of his quiet possession, and a failure of the consideration on which only the tenant was obliged to pay rent, I am of opinion that it ought to have been received; and that therefore the judgment of the supreme court should be reversed, with directions to issue a *venire de novo*.

I cannot omit the opportunity presented by this case, of observing, that it appears to me to be one of those within the view of the framers of our constitution, in the organization of this court. When this court, of last resort, was declared to consist of the senators, with the chancellor and judges, it must have occurred, that the largest proportion of its members would be citizens not belonging to the legal profession. And it must, therefore, have been intended to collect here, a body of sound practical common sense, which would not overthrow law, but which would apply the principles and reasons of the law according to the justice of each case, without regard to the technical refinements and arbitrary and fictitious rules, which will always grow upon professional men. And herein I conceive, is the great excellence of this court; that whenever it perceives a rule established by the inferior courts, pushed to such an extent as to produce positive injustice, it is within its power, as it most certainly will always be its disposition, to rescind or modify such rule. Several signal examples of the exercise of this power might be cited in the decisions of this court. Were this, then, a case in which the law was considered settled by the supreme court, that nothing but a physical turning a tenant out of possession would exonerate him from the payment of his rent, it would be pre-

cisely such as would require and justify the interposition of this court to correct it; not by making law, but by applying its familiar and elementary principles to a new case. Suppose the landlord had established a hospital for the small pox, the plague, or the yellow fever, in the remaining part of this house; suppose he had made a deposit of gunpowder, under the tenant, or had introduced some offensive and pestilential materials of the most dangerous nature; can there be any hesitation in saying that if, by such means, he had driven the tenant from his habitation, he should not recover for the use of that house, of which, by his own wrong, he had deprived his tenant? It would need nothing but common sense and common justice to decide it. No man shall derive benefit from his own wrong. The idea that the tenant has some other remedy to remove the evil, does not reach the case where the injury is already inflicted. Besides, it has been entirely exploded on the argument of this cause. For, in the very case where it is admitted, the tenant would be exonerated from the payment of rent, where there had been an actual eviction and physical expulsion by his landlord, he has an adequate and effectual remedy under the statute to prevent forcible entries.

But as has been before remarked, even the cases admit that the tenant may be exonerated from rent without a physical expulsion; and there is no necessity to call upon this court to establish the law of a new case. It is already established in conformity with what appears to me the plainest dictates of justice.¹

A majority were for reversal.

Whereupon

It was ordered, that the judgment of the supreme court be reversed; and that a *venire de novo* should issue in the court below.²

EDGERTON v. PAGE

20 N. Y. 281. 1859.

APPEAL from the Common Pleas of the city and county of New York. Action to recover one quarter's rent of the first floor of brick building No. 8 Fulton Street in said city, for the quarter ending May 1st, 1855, leased by the plaintiff to the defendant for one year from May 1st, 1854, at a yearly rent of \$1,500, payable quarterly on the first days of August, November, February, and May. The de-

¹ The opinions of Crary, Colden, and Allen, Senators, are omitted.

² See *Lancashire v. Garford Mfg. Co.*, 119 Mo. App. 418; *Weiler v. Pan-coast*, 71 N. J. L. 414; *Wolf v. Eppenstein*, 71 Oreg. 1. Compare *Grabenhorst v. Nicodemus*, 42 Md. 236; *DeWitt v. Pierson*, 112 Mass. 8; *Aguglia v. Cavicchia*, 229 Mass. 263, L. R. A. 1918 C. 61 note; *Stewart v. Lawson*, 199 Mich. 497, L. R. A. 1918 D 396 note; *Gilhooley v. Washington*, 4 N. Y. 217; *Thompson v. R. B. Realty Co.*, 105 Wash. 376.

fendant in his answer set out a copy of the lease, by which it appeared that the defendant was to have the privilege of renewal for one year at the same rent. The answer alleged that this privilege was one of the main inducements on the part of the defendant to the taking of the lease, and one of the principal causes of its value. The answer further alleged that the plaintiff, between the first days of February and May, 1855, was the occupant of the entire upper part of the building in question, and also of the adjoining building; that between those days, and while the defendant occupied the demised premises, the plaintiff wantonly, maliciously, and negligently, permitted certain water-pipes, coming down through the rear of the building and communicating with a sewer under the demised premises, and which pipes were used for carrying off the waste water from the upper stories of the building, to get out of order and leak; that the plaintiff, knowing this, maliciously and negligently permitted large quantities of water and filth to flow through the pipes, which leaked therefrom into the demised premises, injuring the property of the defendant, deposited therein, to the amount of \$390, interfering with and depriving the defendant of the beneficial enjoyment of the premises; that the plaintiff could, by ordinary care and prudence, have prevented the injury, and that the defendant requested the plaintiff to repair the pipes or abstain from their use, which he neglected to do; that the defendant was injured to the amount of \$250 in the prosecution of his business during the quarter in question. The answer further alleged, that at divers times during the quarter in question, large quantities of water, filthy and otherwise, were thrown out by the plaintiff and his servants, from the rear windows of the portion of the building occupied by the plaintiff, so negligently and maliciously as to run into the demised premises, by which the defendant was injured to the amount of \$150; that the defendant was compelled, by the injuries, to abandon the possession of the premises on or about the 1st of May, 1855, thereby losing the benefit and being deprived of the privilege of renewal created by the lease which he intended to avail himself of but for said injuries. The answer insists upon the facts as a defence to the action, and also as a counter-claim. The plaintiff demurred to the answer and assigned several causes, among them that the facts did not constitute a defence nor a counter-claim available to the defendant in the action. The cause was heard at Special Term, and judgment given for the defendant upon the demurrer. The plaintiff appealed; the court at General Term reversed the judgment, and gave judgment for the plaintiff, from which the defendant appealed to this court.

GROVER, J. The demurrer presents two questions: First, whether the facts alleged in the answer constitute a defence; second, whether they constitute a counter-claim, available to the defendant by way of recoupment or otherwise in this action. The rule has long been

settled, that a wrongful eviction of the tenant by the landlord, from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof until the possession is restored. *Christopher v. Austin*, 1 Kern. 217. Whether this eviction must be actual by the forcible removal of the tenant by the landlord from the demised premises or a portion thereof, was not settled in this State until the case of *Dyett v. Pendleton*, 8 Cow. 728. In that case, the principle was established by the Court of the Correction of Errors, that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of the rent was barred, although the lessor had not forcibly turned the tenant out of possession. Ever since that case, this has been considered as a settled rule of law binding upon all the courts of the State. Such act of the lessor, accompanied by an abandonment of possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent. The reason of the rule is, that the tenant has been deprived of the enjoyment of the demised premises by the wrongful act of the landlord; and thus the consideration of his agreement to pay rent has failed. In case of eviction from a portion of the premises, the law will not apportion the rent in favor of the wrong-doer.

In this case, the answer shows that the defendant continued to occupy the premises for the whole time for which the rent demanded accrued. In this, the case differs from *Dyett v. Pendleton*, *supra*. I cannot see upon what principle the landlord should be absolutely barred from a recovery of rent, when his wrongful acts stop short of depriving the tenant of the possession of any portion of the premises. The injury inflicted may be to an amount much larger than the whole rent, or it may be of a trifling character. In all the cases where it has been held that the rent was extinguished or suspended, the tenant has been deprived, in whole or in part, of the possession by the wrongful act of the landlord, either actually or constructively. There is no authority extending the rule beyond this class of cases. It would be grossly unjust to permit a tenant to continue in the possession of the premises, and shield himself from the payment of rent by reason of the wrongful acts of the landlord impairing the value of the use of the premises to a much smaller amount than the rent. This must be the result of the rule claimed by the defendant. The moment it is conceded that the injury must be equal to the amount of the rent, the rule is destroyed. It would then only be a recoupment to the extent of the injury. In *Ogilvie v. Hull*, 5 Hill, 52, Nelson, C. J., in giving the opinion of the court, says: That no general principle is better settled, or more uniformly adhered to, than that there must be an entry and expulsion of the tenant by

the landlord, or some deliberate disturbance of the possession depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of the rent. The rule contended for by the defendant is a very different one, suspending or extinguishing the rent whenever the enjoyment, in consequence of the tortious acts of the lessor, becomes less beneficial than it otherwise would have been. The true rule, from all the authorities is, that while the tenant remains in possession of the entire premises demised, his obligation to pay rent continues.¹

The remaining question is whether a counter-claim, arising from the facts contained in the answer, is available to the defendant in this action. By section 149 of the Code, the defendant is permitted to include in his answer new matter, constituting a counter-claim. Section 150 defines the class of demands which are embraced in section 149, as counter-claims. A counter-claim must be, 1st, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; or 2d, in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The demand of the defendant, set out in the answer, does not arise out of the contract set forth in the complaint. That contract is for the payment of rent, upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff in permitting water to leak and run into the premises, and in causing or permitting it to be thrown upon the premises and property of the defendant. These acts are entirely independent of the contract of leasing upon which the action is brought. The demands are not connected with the subject of the action; that is, the rent agreed to be paid for the use of the premises. The defendant's demands are for a series of injuries to his property deposited upon the premises, and for impairing the value of the possession. It would be a very liberal construction to hold that in an action for rent, injuries from trespasses committed by the lessor upon the demised premises might be interposed as a counter-claim. The acts of the plaintiff in this case are of a similar nature. They are either acts of trespass or negligence, from which the injuries to the defendant accrued. Such a construction could only be supported by the idea, that the subject of the action was the value of the use of the premises. But when there is an agreement as to the amount of rent, that value is immaterial. Unless the acts of the defendant amount to a breach of the contract

¹ Accord, *Veysey v. Moriyama*, 195 Pac. (Cal.) 662; *Taylor v. Finnigan*, 189 Mass. 568; *Bowder v. Gillis*, 132 Minn. 189; *Metropole Construction Co. v. Hartigan*, 83 N. J. L. 409; *California Bldg. Co. v. Drury*, 103 Wash. 577. And see *Edwards v. Candy*, 14 Hun. (N. Y.) 596; *Tham v. Carroll*, 147 App. Div. (N. Y.) 229, 232; *Boreel v. Lawton*, 90 N. Y. 293. Compare *Epstein v. Dunbar*, 221 Mass. 579.

of letting, they are not connected with the subject of the action. In the case of the *Mayor of New York v. Mabie*, 3 Kern. 151, it was held by this court that a covenant for quiet enjoyment by the lessor was implied in a lease under seal, for a term not exceeding three years, since as well as before the Revised Statutes; that this covenant was broken by an interference with possession by the lessor under a claim of right; consequently, that damages sustained from such acts might be recovered in an action for rent. It was remarked by Denio, J., in giving the opinion in that case, that it is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant; although the covenantor cannot avail himself of the subterfuge, that his entry was unlawful, and he therefore a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under an assumption of title. For this, the learned judge cites *Platt on Covenants*, 319, 320. There is nothing in the answer in this case tending to show, that any of the acts of the defendant were done under any claim of right whatever. They did not therefore amount to a breach of the contract created by the lease, and the injuries sustained by the defendant do not therefore constitute a counter-claim connected with the subject of the action. The judgment should be affirmed.

All the judges concurring,

*Judgment affirmed.*¹

HARPER v. MCMAHON

167 Wis. 388. 1918.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action begun in the civil court to recover a balance of rent due on the lease of a flat, vacated by defendant because he claimed adequate heat was not furnished as provided for in the lease. Defendant rented the flat in August, 1913; paid rent till the 1st day of March, 1914, and vacated it the latter part of February of that year. The civil judge found as facts "that from and after the third week in December of the year 1913 the said plaintiff failed and neglected to furnish heat to the said apartment as required by said lease, and continuously thereafter failed and neglected to so operate the heating apparatus of said building so as to furnish heat reasonably required for the habitation of said apartment." He further found that the defendant notified the agent in charge of the flat of the lack of heat at least once in December, 1913, once in January,

¹ See *Smith v. Greenstone*, 208 S. W. (Mo. App.) 628; *York v. Steward*, 21 Mont. 515; *Weinstein v. Barrasso*, 139 Tenn. 593. Compare *Boston Veterinary Hospital v. Kiley*, 219 Mass. 533; *Alger v. Kennedy*, 49 Vt. 109.

1914, and twice in February, 1914, and he also notified the janitor at least six different times and that at least two of such notices to the janitor were by him communicated to the agent in charge of the flats. As conclusions of law he found that plaintiff's failure to furnish adequate heat constituted a breach of the lease and an eviction and that defendant was entitled to a judgment dismissing the action upon the merits. From a judgment entered accordingly the plaintiff appealed to the circuit court. It held the evidence did not show a breach of the lease or an eviction and entered judgment for plaintiff for the balance of the rent due after March 1, 1914. The defendant appealed.

VINJE, J. The learned circuit judge must have proceeded upon an erroneous idea of what constitutes an eviction by reason of lack of heat in reaching the conclusion that there was no breach of the lease in this case because of deficient heating. He says in his opinion, "There is testimony that the apartment was cold upon occasions, but I do not think it justifies the conclusion that it was *continuously* cold so as to make it not habitable." A dwelling need not be continuously cold in order to be uninhabitable within the meaning of a lease agreeing to furnish heat in a city apartment. Under such an agreement the tenant is entitled to sufficient heat to make the apartment generally comfortable to dwell in for ordinary men, women, and children. That there may be lapses from such a condition owing to the severity and sudden changes in our climate, to occasional inattention on the part of the janitor, to necessary repairs of the heating apparatus, or other excusable causes, without constituting an eviction, is well settled. Such was the ruling in *Northwestern R. Co. v. Hardy*, 160 Wis. 324, 151 N. W. 791. The circuit judge further states that "the occasional freezing up of the maid's bathroom would not be sufficient to justify the conclusion that there was an eviction. There was another bathroom which she was at liberty to use." It is true that occasional freezing up of the maid's bathroom might not constitute an eviction, but not because her mistress, as in this case, allowed her to use her bathroom, but because the freezing was only occasional and excusable. A tenant is entitled to the use of the entire premises rented by him, and the landlord cannot excuse a wrongful eviction from a portion thereof by the plea that the tenant can use the remainder. We reach the conclusion that the learned circuit judge erred in his conception of what constituted an eviction the more readily because the evidence practically without dispute, sustains the findings of the civil court as to the lack of heat. That being so, we cannot assume that the circuit judge was unmindful of the oft-repeated rule that findings of fact made by the civil court should not be set aside by the circuit court upon appeal unless against the clear preponderance of the evidence. *Pabst B. Co. v. Milwaukee L. Co.* 156 Wis. 615, 146 N. W. 879; *Mechanical A. Co. v. Kieckhefer E. Co.*, 164 Wis. 65, 159 N. W. 557. Here the evidence showed that the defendant and his

family were troubled almost constantly by a low temperature. They had to go to bed at 10 or a quarter past to keep warm. Early in the morning the temperature was from 40 to 50 degrees. In the afternoon it would go up to 60, 62 or 63 degrees, and then in the evening it would get warm. One bathroom froze up three times in one week, and the maid's bathroom was frozen up for two weeks, and she could not sit in her room at all evenings without wraps on, and the family often had to sit in their wraps to keep warm. This lack of heat was not denied by the evidence of plaintiff. All it tends to show is that the heating plant, if properly run, was adequate to heat the apartment, and that it was customary to shut off heat at night except in the coldest weather. In view of the uncontradicted evidence as to the continued lack of heat and the repeated notice thereof to plaintiff, the circuit court should have affirmed the judgment of the civil court. There can be no doubt that under the evidence, only a portion of which is here given in substance, there was in this case a failure to furnish the required amount of heat. That amount, as before stated, is such as will render the temperature of the rooms reasonably comfortable for the average person generally during the time they are customarily occupied, due regard being had to the kind of use for which each room is intended and excluding lapses due to sudden and severe changes in temperature, to occasional inattention by the janitor, or to the necessity of making repairs to the heating plant, or to other unforeseen or excusable causes. Otherwise the temperature must be maintained at such a degree as will render the rooms reasonably comfortable for the ordinary tenant during the time they are usually occupied for the intended purposes.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the civil court.¹

ROYCE v. GUGGENHEIM

106 Mass. 201. 1870.

CONTRACT for the rent from March 7 to April 7, 1869, of real estate leased by the plaintiff to the defendant for three years from September 7, 1868 (by a lease, dated on that day, which described the demised premises as "the small wooden house and store, now occupied by said Guggenheim and numbered 117 on Eliot Street in Boston," and contained no express covenant on the part of the landlord.

¹ *Morse v. Tochtermann*, 21 Cal. App. 726; *Conroy v. Toomay*, 234 Mass. 384; *Bass v. Rollins*, 63 Minn. 226; *Berlinger v. MacDonald*, 149 App. Div. (N. Y.) 5; *Russell v. Olson*, 22 N. D. 410; *McSorley v. Allen*, 36 Pa. Super. 271; *Buchanan v. Orange*, 118 Va. 511, *accord*. And see *New York Central R. R. v. Stoneman*, 236 Mass. 82; *McDuffee v. Colwell*, 207 Mich. 154; *Hansman v. Western Union Tel. Co.*, 144 Minn. 56; 37 L. R. A. n. s. 1217 note; L. R. A. 1916 E 742 note.

At the trial in the Superior Court, before *Rockwell*, J., the defendant relied on his eviction from the premises, in defence against the action; and the plaintiff requested a ruling, "that, in order to constitute an eviction, whether of a part, or of the whole of said premises, it must be as if closed up actual and entire, there being evidence of some use of the alleged evicted rooms." The judge declined so to rule; but instructed the jury "that if the plaintiff, before the month for which rent was sought to be recovered, had evicted the defendant from two or more of the rooms, he cannot recover for that month's rent; that if the rooms, at the time of the lease and for some time after, had light and air enough to make them fit for use as kitchen and sleeping-chamber, and were thus used, and if, after the erection by the plaintiff of the new building in the back yard, against the house, closing the windows of those rooms, those rooms were made entirely unfit for those purposes, and by reason of that unfitness were abandoned, and this erection was not by the license or consent of the defendant, this was an eviction so as to effect a suspension of the rent, and it was not essential to such eviction that the doors of the rooms should have been closed up by the plaintiff so as to prevent the defendant's entry into the same." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions. The bill of exceptions contained no statement of the evidence on the question of eviction, other than appears in the above statement of the instructions given or requested.

GRAY, J. The eviction of a tenant from the demised premises, either by the landlord or by title paramount, is a bar to any demand for rent, because it deprives him of the whole consideration for which rent was to be paid. *Gilbert on Rents*, 145; *Morse v. Goddard*, 13 Met. 177. And his eviction by the landlord from part of the premises suspends the entire rent, because the landlord "shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." Hale, C. J., in *Hodgkins v. Robson*, 1 Ventr. 276, 277; *Page v. Parr*, Style, 432; *Shumway v. Collins*, 6 Gray, 227; *Leishman v. White*, 1 Allen, 489.

To constitute an eviction which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion of the tenant from any part of the premises. Any act of a permanent character, done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons possession, may be treated as an eviction. *Smith v. Raleigh*, 3 Camp. 513; *Upton v. Townend*, 17 C. B. 30.

But no lawful act, done by the landlord upon an adjoining estate owned by him, for the purpose of improving that estate, and not for the purpose of depriving the tenant of the enjoyment of any part of the demised premises, can be deemed an eviction. The mere fact that by an act or default of the landlord, not unlawful in itself,

nor accompanied with any intention to effect the enjoyment of the premises demised, they have been rendered uninhabitable is not sufficient. It is now well settled, both here and in England, that in a lease of a building for a dwelling-house or store, no covenant is implied that it should be fit for occupation. *Hart v. Windsor*, 12 M. & W. 68; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, Ib. 242; *Welles v. Castles*, 3 Gray, 323. And the English authorities, ancient and modern, are conclusive, that even where the landlord is bound by custom or express covenant to repair, and by his failure to do so the premises become uninhabitable, or unfit for the purposes for which they were leased, the tenant has no right to quit the premises, or to refuse to pay rent according to his covenant,¹ but his only remedy is by action for damages. 14 Hen. IV. 27, pl. 35; 27 Hen. VI. 10, pl. 6; Bro. Ab. Dette, 18, 72. Parke, B., in 12 M. & W. 84; *Surplice v. Farnsworth*, 7 Man. & Gr. 576; *Kramer v. Cook*, 7 Gray, 550; *Leavitt v. Fletcher*, 10 Allen, 119, 121.

In the recent English case of *Upton v. Townend*, 17 C. B. 30, after elaborate arguments upon the question, all the judges substantially agreed upon the definition of eviction. Chief Justice Jervis said: "I think it may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." Mr. Justice Williams said: "There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises, which do not amount to an eviction, but which may be either mere acts of trespass, or eviction, according to the intention with which they are done. If these acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction." Mr. Justice Crowder said: "Eviction, properly so called, is a wrongful act of the landlord, which operates the expulsion or amotion of the tenant from the land. The question here is, whether there has been an eviction as it is popularly called, a putting out or depriving the tenants of the subject-matter of the demise." And Mr. Justice Willes said: "If the plaintiff is liable for what has been done, does it amount to an eviction? I am of opinion that it does, as being an act, of a permanent character, done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or of a part of it." The act of the landlord which was there held, upon a statement authorizing the court to draw such inferences as a jury might, to amount to an eviction, was the rebuilding of the tenements upon their destruction by fire (which the

¹ But see *Lewis v. Chisholm*, 68 Ga. 40; *Bissel v. Lloyd*, 100 Ill. 214; *Dolph v. Barry*, 165 Mo. App. 659; *Sheary v. Adams*, 18 Hun. (N. Y.) 181 (statute); *McCardell v. Williams*, 19 R. I. 701, ante, p. 263; 4 A. L. R. 1462 note.

lessor had covenanted to do) in such a manner as permanently to alter the character of the demised premises.

In a still later case, where the tenant, being desirous to underlet, put in a man to show the rooms, and posted in the window a bill stating that they were to be let; and the landlord, being annoyed by this proceeding and by the conduct of the man, turned him out of the house and took down the bill, but left the keys in the rooms; and the tenant did not return, and contended that he had been evicted, and therefore was not liable for the rent,—it was ruled at *nisi prius*, and affirmed by the Court of Queen's Bench upon a motion for a new trial, that it was a question for the jury, whether the act of the landlord was done with the intention of evicting the tenant, or simply for the purpose of expelling the man whom he had put in; and, the verdict being for the landlord, the court refused to set it aside. *Henderson v. Mears*, 1 Fost. & Finl. 636; s. c. 28 L. J. N. S. Q. B. 305; 5 Jur. N. S. 709; 7 Weekly Rep. 554.

It was argued for the defendant, in the present case, that even the erection of a building by the landlord upon adjoining land would be an eviction, if it stopped the tenant's windows; and his counsel cited *Dyett v. Pendleton*, 8 Cowen, 727, in which the New York Court of Errors held that the creation of a nuisance by the landlord in another tenement under the same roof, by bringing lewd women into it, who made a great noise and disturbance there at night, in consequence of which the lessee and his family left the demised premises, was evidence to go to the jury under a plea of eviction. Upon that case, it is to be observed, 1st. The act of the landlord was an unlawful act, and not a lawful use of his other tenement; 2d. The decision of the Court of Errors was not that the facts in law amounted to an eviction, but only that they should have been submitted to the jury; 3. That decision reversed the unanimous judgment of the Supreme Court, as reported in 4 Cowen, 581; 4th. It has since been considered, even in New York, an extreme case. Savage, C. J., in *Etheridge v. Osborn*, 12 Wend. 529, 532. Nelson, C. J., in *Ogilvie v. Hull*, 5 Hill, 52, 54. Bronson, C. J., in *Gilhooley v. Washington*, 4 Comst. 217, 219. In *Palmer v. Wetmore*, 2 Sandf. 316, the Superior Court of the city of New York, consisting of Chief Justice Oakley and Justices Vanderpool and Sandford, adjudged that the mere fact of the erection of a building by a landlord on his adjoining land, so as to obstruct and darken the tenant's windows, was not an eviction. To the same effect is *Myers v. Gemmel*, 10 Barb. 537. See also the learned opinion of Judge Daly in *Edgerton v. Page*, 1 Hilton, 320; s. c. 20 N. Y. 281. We cannot, therefore, rest our judgment in the case at bar upon that of *Dyett v. Pendleton*. Nor is it necessary so to do.

The lease from the plaintiff to the defendant was of a house and shop, and contained no express covenant on the part of the landlord. By the law of this Commonwealth, no easement of light and

air exists over adjoining lands unless by express grant or covenant. *Collier v. Pierce*, 7 Gray, 18; *Rogers v. Sawin*, 10 Gray, 376; *Brooks v. Reynolds*, 106 Mass. 31. If the plaintiff had conveyed away the adjoining estate, the grantee might have built thereon so as to stop up the defendant's windows, without affording the latter any right of action for damages, or of suspension or abatement of his rent. And so if the landlord himself erected a building upon any part of the adjoining estate, for the purpose of improving that estate, it was a lawful act, which violated no obligation which he was under to the defendant, and did not constitute an eviction.¹ If, on the other hand, such an act was done by the landlord for the purpose and with the effect of making the defendant's tenement or any room therein uninhabitable, the defendant might perhaps at his election treat it as an eviction, and give up the premises and refuse to pay rent. At any rate he might do so, if the building was erected upon part of the curtilage included in his lease, closing the windows of his dwelling-house so as to make a part of it uninhabitable; because that would be the erection of a permanent structure on part of the demised premises, materially changing the character and beneficial enjoyment thereof; and in such case the landlord would be responsible for the effect of his wrongful act, without further proof of unlawful intent. *Upton v. Townend*, 17 C. B. 30, above cited.

Applying these principles to the bill of exceptions, we are of opinion that the plaintiff fails to show that he was aggrieved by the instructions given at the trial. Under those instructions, the jury must have found that by the plaintiff's erection of a new building in the back yard against the house, without the tenant's consent, two of the rooms therein, previously used as a kitchen and bedroom, were made entirely unfit for those purposes, and by reason of that unfitness were abandoned. The bill of exceptions does not show that the plaintiff contended that the rooms could have been used for any other purpose after the erection of the new building, or that the back yard was not part of the demised premises, or made any question, or asked for any ruling, as to the intention with which he erected that building.

*Exceptions overruled.*²

WADE v. HERNDL

127 Wis. 545. 1906.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

By a lease executed and delivered on October 14, 1901, plaintiff leased defendant, from that time until May 1, 1903, "in the city

¹ And see *Keating v. Springer*, 146 Ill. 481, 493. But compare *Dunton v. Sweet*, 210 Mich. 525. Cases are collected in 12 A. L. R. 163 note.

² See *Sherman v. Williams*, 113 Mass. 481.

of Milwaukee, . . . one large front room, . . . to be occupied for an art studio and for no other purpose whatever," at a rental of \$18 per month. Defendant paid the rent up to and including the month of December, 1902. Plaintiff sets up two causes of action, the first being for the unpaid rent for the months of 1903 which is due under the lease, and for a second cause of action plaintiff sets up a contract with defendant for the heating of the room leased from October 1, 1902, to May 1, 1903, for \$35. August 1, 1902, the first floor of the building, under the defendant's studio, was occupied by an automobile company under a lease from plaintiff. Defendant alleges that she refuses to pay rent as provided by the lease on account of the shaking and vibration of the building and her room, caused by the operation of automobiles in the building and under her apartment. She claims that she was thereby prevented from conducting her vocation and business as an artist, and through the fault of the plaintiff in leasing to and permitting the automobile company to use part of the building as an automobile livery she was compelled to leave the premises before her lease expired. The heating plant by which plaintiff proposed to supply defendant with heat and which forms the basis for the second ground of action was not completed until November 1, 1902. Defendant claimed that it was insufficient, and she continued to heat her room by a stove. No error is claimed as to this claim on this appeal. Defendant alleges that as a result of her eviction, through plaintiff's fault in rendering the room unsuitable for the purposes for which it was leased to her, she has sustained damages for which she counterclaims in this action. She alleges that the shaking of the building, caused by the conduct of the automobile business below her, broke and completely destroyed a glass Christ head which she had painted and which was valued at \$125. She claims that the expense of moving and installing herself in her new studio amounted to \$26, and she also demands compensation in the sum of \$30 for the loss of a week's time. The verdict of the jury disallowed all of the claims of the plaintiff and found for the defendant for the full amount counterclaimed. Judgment was accordingly entered in defendant's favor for \$181 damages and \$57.97 costs. This is an appeal from such judgment.

SIEBECKER, J. The law governing the rights and liabilities of landlord and tenant, in cases wherein the tenant asserts eviction from the premises, is that actual expulsion is not necessary, but that any act of the landlord or of any one who acts under authority or legal right given him by the landlord which so disturbs the tenant's enjoyment of the premises as to render them unfit for occupancy for the purposes for which they are leased, is an eviction, and, whenever it takes place, the tenant is released from the obligation under the lease to pay rent accruing thereafter. *Halligan v. Wade*, 21 Ill. 470; *Silber v. Larkin*, 94 Wis. 9, 68 N. W. 406; *Pridgeon v. Excelsior Boat Club*, 66 Mich. 326, 33 N. W. 502; 2 Wood, Landl. & T. (2d. ed.,) § 477.

The jury were instructed that if they found "from the evidence that the vibration or shaking of the building in which defendant's studio was situated, which were caused by the conduct of the automobile company, were such that the defendant was thereby prevented from properly carrying on her work as a glass painter, and her paintings thereby became liable to be damaged or destroyed, and said premises thereby made unfit for the purpose of an art studio, so that she had to abandon the same," then the defendant, as lessee, was evicted from the premises. Under this instruction the jury found that she had been evicted. The question then arises: What party is responsible for the injury thus occasioned to the defendant? The trial court instructed the jury that plaintiff was responsible, upon the ground that "under the evidence in this case the presumption stands uncontradicted that the automobile company, under their lease, had a right to test their machines and to do what they did, so far as the evidence shows." This instruction is assailed as not warranted by the evidence. It is claimed that it is shown that the vibration and shaking complained of by the defendant as causing her injury was due to the unusual conduct of those conducting the automobile business, and it is therefore not attributable to plaintiff under the authority given by the lease. It appears that the testing of automobiles caused the trembling complained of. This consisted in running the engines of different machines which were stored in the company's show room, and in starting the engine of any auto car to ascertain whether it was in proper running order and ready for use. Such testing was an incident to the regular conduct of the business of the establishment and was not confined to engines undergoing repairs in the shop. Defendant's room was located over that part of the display room where this testing was done. There is nothing to show, and the trial court so held, that this testing was unnecessary or unusual, but it appeared that under the circumstances it was a necessary part of the conduct of the business. It must, therefore, have been within the contemplation of the parties when the lease of the premises was made. The evidence also discloses that, upon the complaint of defendant concerning this disturbance in her room, plaintiff investigated the matter and, at the request of the parties conducting the automobile business, came to the defendant's room to observe the effect of such testing. He claimed and asserted that such testing did not interfere with defendant's use of her room, and he did not thereafter take any steps to prohibit the company from continuing to make the tests. Under these facts and circumstances the court did not err in holding that the acts of those in charge of the automobile business were within the rights granted them by plaintiff under the lease to occupy and use the premises to conduct an automobile business. This presumption stands without substantial contradiction in the evidence. It must follow that the instructions upon this branch of the case were correct and that the court properly rejected those requested by the plaintiff.

It is contended that the court erred in striking out that part of the defendant's testimony appertaining to the value of the broken picture to her individually, as a design, apart from its market value. The measure of damages is the pecuniary loss suffered by the breakage, and that would be the diminution in the market value of the article injured. The evidence so stricken out had no bearing on the market value, and the court properly excluded all such evidence. The evidence on the subject tended to show that the picture had no market value after it was broken, and justified the inference that defendant was damaged in the amount claimed.

Another exception argued is to the allowance of expenses incurred in removing from the premise. It is thereby assumed that defendant would have been compelled to incur a like expense at the expiration of her tenancy, and that she cannot be deemed to have been damaged by paying it at the time she did. This assumption is, however, conjectural, for it is far from certain that like expenses would have been incurred at the expiration of the tenancy. If she had occupied the premises until the expiration of her lease, various contingencies might have arisen whereby these expenses might have been avoided. This element of damages must be held to have resulted from the wrongful eviction. Her loss of time in her employment on account of such removal is likewise a proper element of recovery resulting from the breach of the obligation.

Exemption from liability is asserted by plaintiff under the provision of the lease wherein it is stipulated that the lessor shall not be liable for any damage occasioned by or from acts particularly mentioned, among which are specified "acts or neglect of cotenants or other occupants." It is obvious that this exemption does not apply to the acts or neglect of such parties authorized or committed under any right given by the plaintiff as lessor of the premises. After examination of the errors assigned we are led to the conclusion that there is no error in the respects alleged.

By the Court. — *Judgment affirmed.*¹

HOPKINS, TRUSTEE v. MURPHY

233 Mass. 476. 1919.

CONTRACT, brought by the plaintiff, as trustee, on a covenant to pay rent in a lease of the upper of two suites in a house numbered 67 on Winthrop Road in Brookline, to recover rent for the months of February, March and April, 1916, at the rate of \$79.17 per month. Writ in the Municipal Court of the City of Boston dated April 4, 1916.

¹ Compare *Boston Ferrule Co. v. Hills*, 159 Mass. 147; *Boreel v. Lawton*, 90 N. Y. 295; *Toy v. Olinger*, 181 N. W. (Wis.) 295.

The answer, among other things, alleged that before the rent mentioned in the plaintiff's declaration became due the defendant was evicted from the premises by the plaintiff "permitting large numbers of vermin or roaches to invade said premises or a substantial part thereof and to continue therein, rendering the premises impossible and dangerous for use for the purposes for which rented."

On removal to the Superior Court the case was tried before *Keating, J.* The evidence is described in the opinion. At the close of the evidence the plaintiff moved that a verdict be ordered in his favor. The judge granted the motion and ordered a verdict for the plaintiff in the sum of \$276.28. At the request of the parties the judge reported the case for determination by this court.

If the ordering of the verdict was right, judgment was to be entered for the plaintiff on the verdict; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs.

CROSBY, J. This is an action to recover rent under a written lease of the upper suite in a two-family house. The defendant denies liability and contends that he was constructively evicted from the premises by reason of the presence in the suite of large numbers of "roaches," rendering it unfit for occupancy. We understand that "roaches" as described in the record are what are commonly known as "cockroaches." There was no evidence to show that there were any cockroaches in the leased premises until about December 1, 1915,—more than two years after the defendant's occupancy began. It appeared that as soon as the plaintiff was notified by the defendant of their presence, he sent a man to the house to destroy them, but his efforts in that direction were not successful.

It is well settled that in a lease of real estate no covenant is implied that it should be fit for occupation; and this is true of a lease of a building for a dwelling-house. *Royce v. Guggenheim*, 106 Mass. 201, 202. *Pomeroy v. Tyler*, 9 N. Y. St. Rep. 514. *Murray v. Albertson*, 21 Vroom, 167. In the absence of an express agreement between the parties or of fraudulent representations or concealment by the lessor, the lessee takes the demised premises as they exist and the rule of *caveat emptor* applies. *Skally v. Shute*, 132 Mass. 367. *Rothe v. Adams*, 185 Mass. 341. To constitute a constructive eviction, it must appear that by his intentional and wrongful act the landlord has deprived the tenant of the beneficial use or enjoyment of the whole or a part of the leasehold. *Smith v. McEnany*, 170 Mass. 26. *Taylor v. Finnigan*, 189 Mass. 568. *Voss v. Sylvester*, 203 Mass. 233. *Nesson v. Adams*, 212 Mass. 429.

The record shows that the demised premises were in a new building and had not been occupied before the defendant's tenancy

began, and that no cockroaches were seen there by the defendant until more than two years thereafter. There is nothing to indicate that the plaintiff was responsible for the presence of the insects or that he failed in any duty which he owed to the defendant. His unsuccessful attempt to exterminate them could not be found to be a constructive eviction of the defendant. Everybody knows that cockroaches, ants and other objectionable insects will sometimes appear in dwelling houses to the annoyance of the occupants. It is manifest that the plaintiff was not responsible for the presence of the cockroaches and that he did nothing with the intention and effect of depriving the defendant of the demised premises. Under such circumstances the evidence would not warrant a finding that there was an eviction. The fact that the landlord, upon notice from the tenant, attempted to remedy existing conditions, was a gratuitous act, and was not evidence of an eviction. *McKeon v. Cutter*, 156 Mass. 296, 298.

There was evidence that before the defendant vacated the tenement the plaintiff learned there were cockroaches in the lower suite, occupied by another tenant. When he received this information does not appear. It is not evidence of a constructive eviction.

The cases relied on by the defendant where, by some act of the landlord of a permanent character or by reason of false representations at the time of the letting, the lessee was deprived of the beneficial enjoyment of the demised premises, are plainly distinguishable from the case at bar. *Royce v. Guggenheim*, *supra*. *Sherman v. Williams*, 113 Mass. 481. *Skally v. Shute*, *supra*.

In accordance with the report, judgment is to be entered for the plaintiff on the verdict for \$276.28 with interest to February 27, 1919. *So ordered.*¹

NEALE v. MACKENZIE

1 M. & W. 747. 1836.

WRIT of error on the judgment of the Court of Exchequer, reported 2 C. M. & R. 84.

LORD DENMAN, C. J.² This is an action of trespass for entering the plaintiff's dwelling-house, and taking his goods.

¹ "Where 'an intolerable condition which the tenant neither causes nor can remedy' arises, there has been held in New York to be constructive eviction from an apartment irrespective of the landlord's causation of the condition or liability in damages for it." 2 Williston, Contracts, § 892. *Barnard Realty Co. v. Bonwit*, 155 App. Div. (N. Y.) 182. And see *Madden v. Bullock*, 115 N. Y. Supp. 723; *Streep v. Simpson*, 80 Miscel. (N. Y.) 666. But see *Pomeroy v. Tyler*, 9 N. Y. St. Rep. 514; *Jacobs v. Morand*, 59 Miscel. (N. Y.) 200. Compare *Stewart v. Lawson*, 199 Mich. 497; 4 A. L. R. 1463 note.

² The opinion only is given.

The declaration is dated the 25th of April, 1834. The defendant, on the 24th of May, 1834, pleaded that he, being seised of the dwelling-house and certain other premises, demised the same to the plaintiff for one year from the 25th of June, 1833, at the rent of £70, payable quarterly; that the plaintiff accepted the lease, and, by virtue of the said demise, entered into and upon the said demised premises, and thereupon became and yet was possessed thereof for the said term so granted to him as aforesaid; and, until the 25th of December, 1833, and from thence until and at the time when, &c., held and enjoyed the dwelling-house and premises by virtue of the said demise; that on the said 25th of December, 1833, £35 of the rent was in arrear, wherefore the defendant entered and made a distress of the same.

The plaintiff, on the 6th of December, 1834, replied that one Adam Charlton, before the demise in the plea mentioned, and from thence and still was in possession of eight acres of land of the said demised premises, under and by virtue of a demise theretofore made by the defendant to him, which demise was then and *from thence had been and still was in full force and undetermined*, whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the said last-mentioned land, so being parcel of the demised premises in the plea mentioned; and although he had been willing and desirous of entering, he had been kept out of possession by Adam Charlton by virtue of the demise to him, and the plaintiff had been prevented from holding and receiving the profits.

The rejoinder alleges that the plaintiff, at the time of his entering on the demised premises, had notice that Adam Charlton was in possession of the eight acres as tenant to the defendant, under a demise for a term then unexpired.

To this rejoinder there is a special demurrer, for inconsistency with the plea and departure therefrom.

The question to be determined is, whether the replication be an answer to the plea.

It has been argued that the impediment to the plaintiff's obtaining possession of the eight acres demised to Adam Charlton by the defendant previously to the demise made to the plaintiff, is in the nature of an eviction. On one side it is contended that it is analogous to an eviction by title paramount, the right of Adam Charlton being prior to the demise made by the lessor, and to the title acquired under that demise by the lessee; and on the other side, that it is analogous to an eviction by the tortious act of the lessor, since the impediment arises from the wrongful act of the lessor himself in demising land which he had already parted with; and is not to be distinguished in principle from the case of an entry upon the lessee under a demise made by the lessor to a stranger immediately after possession taken by the lessee.

If the former of these views be adopted, the rent will be apportion-

able, and the distress justified by the plea: for it is clear that a person may distrain for apportionable rent; and, if the defendant was entitled to distrain at all, the action of trespass cannot be maintained. If the latter view be correct, the defendant was not entitled to distrain at all, so long as the plaintiff was kept out of possession of any part by his wrongful act.

But, we are of opinion that the impediment to the plaintiff's taking possession in this case, is not analogous to an eviction: for it appears to us that no interest in the eight acres previously demised to Adam Charlton passed to the plaintiff by the demise subsequently made to him. The demise to Adam Charlton covered the whole time during which the rent distrained for accrued.

But it has been supposed, that notwithstanding the demise to Adam Charlton, by which the defendant had parted with his right of possession in the eight acres, the plaintiff by his subsequent lease took an *interesse termini* in these eight acres for the period of his own lease, viz., one year, so as to give him a right to a term for all that period, and to the possession on the determination of the prior lease by efflux of time, or by any other lawful mode, whenever and in whatever way it should be determined; and that the existence of the prior demise being the impediment by which alone the plaintiff was prevented from obtaining possession under the demise to him, the case must be governed by the same principle as that of an eviction by title paramount: and, if any interest in the eight acres did pass to the plaintiff under the demise to him, we might possibly be disposed to accede to this view of the case; considering that eviction by title paramount means eviction by a title superior to the titles both of lessor and lessee; against which neither is enabled to make a defence.

It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that the demise to the plaintiff of the eight acres in question was wholly void.

It has been already observed that the demise to Charlton made previously to the demise to the plaintiff, covers the whole of the plaintiff's term; or at least the whole period for which the distress was made. Now, it is expressly laid down in Bacon's Abr., Leases (N.), (which is to be considered as the language of Lord Chief Baron Gilbert) as follows: "If one make a lease to A. for ten years, and the same day make a parol lease to B. for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. The reason whereof is, because the first lease being made for ten years, the

lessor during that time had nothing to do with the possession, or to contract with any other for it; and the second lease being made the same day, and for no longer term than the first ten years, would not pass any interest as a future *interesse termini* certainly; for the first lessee had the whole interest during that time; and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interesse termini*, when at the time of making thereof it was absolutely void for want of a power in the lessor to contract for it; and as a reversionary interest it cannot be good for want of a deed." And a little further on, "But now, if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years for the reasons before given, but for the last ten years it had been good; because, when the first ten years were elapsed, the second lessee might then execute and reduce into possession by entry as well as if it had been at first made in possession; for, it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore, by its termination, lets in the second lease; but, as a grant of the reversion such second lease could not be good for want of a deed, for the reasons before given, neither could any attornment help it or let in the second lease, till the first ten years ran out by effusion of time." And afterwards it is said that if, after a lease for ten years, a second lease by deed poll were made for twenty years, it might take effect with attornment as a grant of the reversion, or, if no attornment could be had, "yet it would inure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol."

It has been remarked that the doctrine here laid down is derived from the argument of counsel in the case of *Bracebridge v. Clowse*, in Plowd. 421; but it may be answered, that although the matter introduced into Bacon's Abridgement is first distinctly found in the argument set forth at length in Plowden, it now stands upon the authority of Lord Chief Baron Gilbert. Moreover, the point immediately under consideration in this case is confirmed by the opinion of Gawdy, J., in *Dove v. Willcot*, Cro. Eliz. 160, who says: "If a lease be made for two years, and after the lessor let the land for four years, this is but a lease for two years, *although the first lessee surrender*, for he had no power to contract for the first two years at the beginning; but otherwise when the estate is determinable upon an uncertainty;" and cites Plowd. Comment. *Smith and Stapleton's Case*, which is the case where the argument is fully stated, — fo. 432.

It may be remarked also that in Comyn's Digest, title Estates (G. 13), it is said that a lease which cannot take effect in interest,

except by possibility, if it be not an estoppel, shall be void; as, if tenant in fee leases by parol to A. for nine years, and the same day to B. for nine years, the lease to B. shall be void. For this he cites Plowden, 432; and though this statement be only part of the language of the apprentice who argued the case of *Smith v. Stapleton*, Chief Baron Comyns, by introducing it in this general way, must be considered as adopting it in some degree at least as authority; in what is said by Gawdy, as referred to in Cro. Eliz. 160, there is afterwards added *Smith v. Stapleton*, Plow. 426, though it is not clear whether this be his language or that of the reporter.

This same doctrine, as far as regards a second parol lease for years after a former lease for years, appears to have been treated as clear law in various books; though the effect of such a lease made after a prior lease for life, has been the subject of discussion. See Bro. Abr. Lease, pl. 35, 48; Plowden, 521, note of the reporter. *Welchden v. Elkington*, Plowd. 521; Plowden's Quæries, 122 and 161; *Sir Hugh Cholmondeley's Case*, Moore, 344, in the argument of Cook, Attorney-General. So, in *Watt v. Maydewell*, Hutton, 105: "If a man make a lease for twenty-one years, and after makes a lease for twenty-one years by parol, that is merely void; but if the second lease had been by deed, and he had procured the former lessee to attorn, he shall have the reversion." *Edward v. Staler*, Hardr. 345, *arguendo*. So, Sheppard's Touchst. 275 b.: "If the second lease be for the same or a less time, as, if the first lease be for twenty years, and the second lease be for twenty or for ten years, to begin at the same time, these second leases are for the most part *void*;" but if the second lease be by fine, deed indented, or poll, it may pass the reversion with attornment when attornment is necessary, and without, if not necessary. But if the second lease be by *word of mouth*, it is otherwise . . . And if the second lease be by *fine, or deed indented*, then it may work by way of *estoppel* both against the lessor and the lessee; so that, if the first lease happen by any means, as, by surrender or otherwise, to determine before it be run out, then the second lessee shall have it."¹

Upon these authorities, therefore, we feel ourselves obliged to hold that the lease to the plaintiff was utterly void, so far as regarded the eight acres demised to Charlton.

If that be so, we are unable to distinguish the case in principle from that of *Gardiner v. Williamson*, 2 Barn. & Adolph 336, where the tithes of a parish, together with a messuage used as a homestead for collecting the tithes, having been demised by parol at a rent of £200 *per annum*, and a distress made for arrears, the Court of King's Bench held that an action of trespass would lie, because the demise of the tithes, being by parol, was void. There was no valid demise,

¹ See *Ecclesiastical Com'rs v. O'Connor*, 9 Ir. C. L. 242; *Holland v. Vanstone*, 27 U. C. Q. B. 15.

it was said, of the whole subject-matter, nor any distinct rent reserved for that part of it upon which there might have been a legal distress. That case was the stronger, because it was contended that the whole rent must be taken to be issuable out of the corporeal hereditament, upon which alone a distress could be made. And accordingly, in a case of a lease by indenture, Dyer is reported to have held (Moore, 50), that, if lands at common law and copyhold lands are leased by indenture rendering rent, all the rent is issuing out of the lands at common law; for the lessor had no power to make such a lease of copyhold, wherefore as to this the lease is utterly void; but it is added, that if a man lets lands, parcel of which he is seised of by disseisin, then the rent is issuing out of all the land, and by the entry of the disseisee the rent shall be apportioned, because the lease of this was not void but voidable. In this last case the tenant took an interest, and enjoyed all the lands demised till the time of his being evicted from a parcel thereof by the disseisee, and was therefore liable in respect of such interest and enjoyment to a portion of the rent. In the case before the court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised, and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small, as far as the principle is concerned), has taken no interest, and had no enjoyment, and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable, either in respect to the whole rent reserved or any portion of it.

It may further be observed, that even supposing the plaintiff to have taken an *interesse termini* in the eight acres, capable of being executed by entry in case the demise to Charlton should happen to be forfeited or surrendered, yet, as that demise to Charlton was in force at the commencement of the plaintiff's tenancy, and continued during the whole period, in respect of which the distress has been made, no demise of those eight acres to the plaintiff ever took effect; and, consequently, no right to any rent in respect of those eight acres has ever come into existence. And we are not aware of any case where an entire rent reserved has been held to be apportionable, in which the tenant has not been at some period subject to the entire rent by virtue of the demise. Here, the right of apportionment is not founded upon any eviction, or other matter occurring subsequently to the demise, but upon an original defect in the demise itself by which the entire rent was reserved. In this respect it is strictly analogous to *Gardiner v. Williamson*.

In the case of *Tomlinson v. Day*, 5 Moore, 558, which has been referred to, the landlord did not claim an apportioned part of an entire rent, either by avowry for a distress or by action for the rent. It was an action for use and occupation, in which he was allowed to

make use of an agreement for a lease (according to the express provision of the Statute 11 Geo. 2, c. 19, § 14), "as evidence of the *quantum* of damages to be recovered;" and, as the defendant had been interrupted in the full enjoyment of what had been agreed for, the plaintiff was held "entitled to recover a reasonable compensation for the property enjoyed by the defendant as an equivalent for rent." The interruption to the defendant's right of exclusive sporting was indeed compared by Lord Chief Justice Dallas and Mr. Justice Richardson to an eviction; but, if it was an eviction, it was clearly an eviction by title paramount. The agreement for exclusive sporting was not void on account of the landlord having made a prior agreement to let it to some other person; but it was defeated, because other persons interfered who had a right superior to that of the landlord. Supposing the circumstances, therefore, to amount to an eviction, it would be a case of apportionment according to the acknowledged rule; and would not assist the argument in favor of the defendant.

Upon the whole, therefore, we are of opinion that the judgment of the Court of Exchequer ought to be reversed.

*Judgment reversed.*¹

MCCLURG v. PRICE & SIMS

59 Pa. 420. 1868.

BEFORE THOMPSON, C. J., AGNEW, SHARSWOOD and WILLIAMS, JJ.
READ, J., absent.

Error to the District Court of Allegheny county: No. 56, to October and November Term 1868.

This was an action of assumpsit, commenced March 26th, 1866, by W. T. McClurg against Mary C. Price and William H. Sims, trading as Price & Sims.

The first count of the declaration averred that the plaintiff, on the 15th day of April 1866, leased to the defendants a warehouse for seven and a half months, at the rate of \$1500 per annum, payable quarterly, the first quarter to be computed from April 1st.

The second count averred, that on the 20th of March the defendants were indebted to the plaintiff in the sum of \$900, for the use

¹ *Lawrence v. French*, 25 Wend. (N. Y.) 443, *accord*. But see *O'Brien v. Smith*, 13 N. Y. Supp. 408; *aff'd* 129 N. Y. 620; *McLoughlin v. Craig*, 7 Ir. C. L. 117. Compare *Smith v. Barber*, 112 A. D. (N. Y.) 187; *Forshaw v. Hathaway*, 112 Miscel. (N. Y.) 112; *Tunis v. Gandy*, 22 Gratt. (Va.) 109.

Exclusion from the whole of the premises by one having a paramount title excuses duty to pay rent. *Duncan v. Moloney*, 115 Ill. App. 522; *Andrews v. Woodcock*, 14 Iowa 397.

On exclusion by a stranger without right, see *Brandt v. Phillippi*, 82 Cal. 640; 2 Tiffany, Real Prop., 2d ed., p. 1490.

and occupation of a warehouse. The declaration contained also the common counts.

On the trial, before *Hampton*, P. J., the plaintiff gave evidence of the occupancy by the defendants of his warehouse and rested. The defendants then called W. C. Robertson, who testified: That a lease was agreed upon between the plaintiff and defendants for the warehouse in question at the annual rent of \$1500 per annum for the whole building, payable quarterly; the defendants were to get possession of all but the fourth and fifth stories on the 12th of May, 1866, and of the fourth and fifth whenever they should want them. There were some old iron, &c., on the premises belonging to the plaintiff, which were to remain in the fourth and fifth stories till "the defendants needed those rooms." The defendants did not get possession of the cellar; it was "lumbered up" with old iron, &c., belonging to the plaintiff. The plaintiff sold the good-will as part of the consideration. Defendants had the privilege of renting for another year on the same terms. John Brisbin testified: The plaintiff occupied part of the second story, with ironware; the fourth and fifth stories were occupied entirely by him. The defendants frequently between May and August told the plaintiff that they wanted the fourth and fifth stories, and would not pay rent unless they got them; plaintiff passed off these requests in a careless way — did not say much and did not give possession of those stories; he was there generally every day from morning till evening; he sold some of his goods from the store during the time. The defendants abandoned the premises about the last of November 1866, for want of room.

The plaintiff requested the court to charge the jury:—

"1. That merely leaving wares and rubbish in portions of the leased building would not be an eviction in law of the lessees, but they would have the right to remove said goods at the expense of the landlord, treating them as they might have done the property of third parties.

"2. That if the jury find from the evidence that the defendants continued in the enjoyment of the larger and more valuable portions of the building, after their alleged demand for possession of the fourth and fifth stories, such conduct is a waiver of any right to treat such possession by the plaintiff as an eviction; and defendants will be liable for a proper rent for the premises actually enjoyed by them."

The points were answered in the charge, and substantially denied.

The defendants asked the court to charge:—

"1 That the facts in evidence showed an eviction in law before any rent had fallen due.

"2 That having made a special contract for the rent of the entire building for a year, plaintiff cannot set that contract aside and bring this action for use and occupation, and recover rent for that part of the building occupied by defendants."

The court affirmed both these points.

The court, after stating the evidence to the jury, charged:—

“These facts, they contend, if proved to the satisfaction of the jury, will constitute a full and valid defence to the plaintiff’s action, for the following reasons: 1. Because they constitute an eviction in law, before any rent had fallen due. But if this position be not sustained, then, 2. That the plaintiff refused, after request, to deliver them the entire possession of the demised premises, and as the plaintiff cannot take advantage of his own wrong in refusing to comply with his contract, by apportioning the rent, the law will not do so for him. 3. That having made a special contract for the rent of the entire building for a year, he cannot set that contract aside and bring this action for use and occupation, and recover rent for that part of the building occupied by the defendants.

[“If you find from the evidence that the contract, as testified to by Mr. Robertson, was entered into by the parties, and that the defendants entered into possession under the same; and that the plaintiff was repeatedly requested by them to give them the possession of the fourth and fifth stories, before any rent had fallen due; that he gave them no definite answer, but put them off from time to time, without any positive refusal, leaving them to infer that he would do so; and that they were finally compelled, for want of room to carry on their business, to rent another house, and moved out in the latter part of November; then we instruct you, that the plaintiff is not entitled to recover in this action for use and occupation for the time the defendants occupied a portion of the building, and your verdict ought to be for the defendants.]

“But if there was no such special contract, but the defendants entered merely with the consent of the plaintiff, then they are liable to pay a fair rent for the use of such portions of the building as they occupied.”

The verdict was for the defendants. The plaintiff removed the case to the Supreme Court, and assigned for error the disaffirmance of his points and the portion of the charge in brackets.

The opinion of the court was delivered, January 4th, 1869, by

WILLIAMS, J. The plaintiff’s retention of a part of the demised premises, and his refusal to deliver possession thereof to the defendants, on demand, in accordance with the terms of his verbal lease, did not constitute an eviction in law. It is doubtless true that there may be an eviction without an actual physical expulsion; but there can be no eviction, actual or constructive, without an antecedent possession. If this case turned on the question of eviction, the plaintiff might be entitled to recover rent for the portion of the premises actually enjoyed by the defendants. But it does not turn on this point. The evidence shows, and the jury have found, that the plaintiff leased his warehouse to the defendants, at an annual rent of \$1500, payable quarterly; that at the making of the contract,

he delivered to them possession of the three lower stories, and agreed to give them possession of the cellar and of the fourth and fifth stories, on demand; that he refused to deliver possession thereof, although repeatedly requested; and that the defendants were finally compelled, for want of room, to abandon the premises and to rent another house for the transaction of their business.

Notwithstanding the plaintiff's deliberate and persistent refusal to perform his contract, he claims the right to recover compensation for the use and occupation of the portion of the demised premises actually enjoyed by the defendants, on the ground that they had the right to treat his goods as they would those of a stranger, and to remove them at his expense. But if the right be conceded, it does not follow that the defendants were bound to exercise it to the exclusion of all other remedies which the law gave them for the redress of the plaintiff's breach of his contract, or that their failure to exercise it will prevent them from setting up any defence to his claim for rent which they might otherwise make. But the defendants had no right to remove the plaintiff's goods. The law gave them no such remedy for his refusal to perform his contract. The evidence not only shows that his goods were in the portion of the demised premises which he withheld from the defendants, but that he was in the daily occupancy thereof for the purpose of selling his goods, and that he made sales from time to time, although part of the consideration of the stipulated rent was the good-will of his business. If the defendants had ejected the plaintiff and turned his goods into the street, or removed them elsewhere, they would have been guilty of a trespass for which his breach of the contract would have afforded them no justification. Nor was their continuance "in the enjoyment of the larger and more valuable portion of the building," after their demand for possession of the residue and its refusal by the plaintiff, a waiver of any of their rights under the contract, or of any defence they might have to the plaintiff's demand for rent, arising from his breach of the contract.

The jury have found that when the defendants demanded possession of the residue of the demised premises, the plaintiff gave them no definite answer, but put them off from time to time, without any positive refusal, leaving them to infer that he would comply with their request. And if the jury had not so found, the plaintiff was bound to perform his contract, and is answerable for all the legal consequences of its breach, unless its performance was actually waived by the defendants. Their continuance in the possession of the three lower stories, after the plaintiff's refusal to deliver possession of the residue of the building, did not in itself amount to a waiver of their right to insist upon a strict performance of the contract. They had the undoubted right to retain possession of the three lower stories, and to hold the plaintiff responsible for his failure to deliver possession of the cellar and of the fourth and

fifth stories, as required by his contract. The only question, then, under the facts of this case, is: Was the plaintiff entitled to recover any portion of the stipulated rent under the count for use and occupation? He leased his warehouse to the defendants for an entire consideration, and his contract must therefore be regarded as an entirety. If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in its subject. The principle is too well settled to admit of doubt, and too familiar to require the citation of authorities in its support, for that the part performance of an entire contract there can be no recovery, unless complete performance has been prevented or waived by the party entitled to demand it.

If the plaintiff had performed his contract he might have recovered on the count for use and occupation, under the statute of 11 Geo. II. ch. 19, which is in force in this state (Rob. Dig. 237), but having failed to perform it he was not entitled to recover, either upon a count on the contract of lease, or upon the statutory count for use and occupation.

The learned President Judge of the District Court was therefore clearly right in instructing the jury that, if they found the facts to be as stated in the charge, the plaintiff was not entitled to recover in this action for use and occupation for the time the defendants occupied a portion of the building, and their verdict must be for the defendants.

*Judgment affirmed.*¹

THRE'R v. BARTON

Moore 94, pl. 232. 1570.

A MAN made a lease for a hundred years, and the lessee made a lease for twenty years, rendering rent, with a clause of re-entry; and afterwards the first lessor granted the reversion in fee, and attornment was had accordingly. The grantee purchases the reversion of the term; he will have neither the rent nor the re-entry, for the reversion of the term, to which it was incident, is extinct in the reversion in fee. And this was adjudged at the Assizes between Lord Thre'r and Barton who was lessee, as *Stephens* relates. And *Plowden* and others agreed to it; but *Popham* took this diversity: If a man makes a lease for life, rendering rent, and the lessee for life makes a lease for years rendering rent, and afterwards the lessee

¹ *Moore v. Mansfield*, 182 Mass. 302, accord. And see *Reed v. Reynolds*, 37 Conn. 469; *Spencer v. Burton*, 5 Blackf. (Ind.) 57; *Moore v. Guardian Trust Co.*, 173 Mo. 218; *Etheridge v. Osborn*, 12 Wend. (N. Y.) 529; *Penny v. Fellner*, 6 Okla. 386. Contra, *Knox v. Herter*, 42 N. Y. Super. Ct. 8. Compare, *Lawrence v. French*, 25 Wend. (N. Y.) 443, 447; *Friend v. Oil Well Supply Co.*, 179 Pa. 290; *Tunis v. Gandy*, 22 Gratt. (Va.) 109.

for life surrenders to him in the reversion in fee, he will not have the rent of the lessee for years, nor an action of waste, because the tenant for life who surrendered could not punish the waste in this case. So if the tenant purchases the reversion in fee, he will not have an action of waste during his own life. But otherwise is it if a man makes a lease for years rendering rent, and afterwards grants the reversion for life, or for years, and he in reversion surrenders to him, he will have the rent or waste, because it was once a rent incident to the reversion, and so it was not in the other. But *Plowden* and *Ipsley* said that all is one as to the action of waste.¹

BEAL v. BOSTON CAR SPRING CO.

125 Mass. 157. 1878.

CONTRACT for rent due under a written lease made by Heyer Brothers to the defendant for the term of five years from April 1, 1874, and by Heyer Brothers assigned to the plaintiff.

At the trial in the Superior Court, before *Allen*, J., it appeared in evidence that the premises described in the lease of Heyer Brothers to the defendant constituted a part of the same premises which Heyer Brothers held under and by virtue of a lease to them for a term of ten years from April 1, 1874, made by the plaintiff, who was the owner of the premises; that on February 7, 1877, when the plaintiff received the assignment from Heyer Brothers of their lease to the defendant, he executed upon the back of the original lease from himself to Heyer Brothers the following instrument: "Boston, February 7, 1877. The within-named lessor, in consideration of the assignment to him of certain underleases made by the within-named lessees of parts of the premises demised in the within lease, and of one dollar to him paid by the within-named lessees, doth hereby release and forever discharge the said lessees, their heirs, executors, and administrators, of and from all claims, demands, and causes of action of and concerning the within lease, and especially all claims by him for rent thereunder; and said lessees do hereby surrender and yield up the said lease and the premises within described to said lessor, and such surrender is hereby accepted by him, but without prejudice to the leases of parts of the premises assigned to him as above mentioned." It further appeared that the terms of this instrument were carried out, and that Heyer Brothers ceased to occupy the premises.

¹ See *Bailey v. Richardson*, 66 Cal. 416; *Buttner v. Kasser*, 19 Cal. App. 755; *Krider v. Ramsay*, 79 N. C. 354, 358; *Webb v. Russell*, 3 T. R. 393; 13 Col. L. Rev. 245. Compare *Grundin v. Carter*, 99 Mass. 15; *Pratt v. Richards Co.*, 69 Pa. 53; *Hessel v. Johnson*, 129 Pa. 173, 178-179; 7 L. R. A. N. S. 221 note.

The defendant offered to show that it had not been in the occupation of the premises since February 7. This evidence was objected to as being immaterial and was excluded.

The defendant contended and asked the judge to rule that if, by the arrangement entered into between the plaintiff and Heyer Brothers, the original lease was on February 7, 1877, given up, discharged or vacated, and the tenancy of Heyer Brothers thereupon ceased, and the plaintiff resumed control of the premises, and Heyer Brothers at the same time assigned and transferred to the plaintiff the underlease before then held by the defendant from them; and if the defendant, when informed of this, ceased to have anything further to do with the premises, and refused to recognize as longer subsisting or continuing in force the underlease given to them by Heyer Brothers, or to become liable to the plaintiff as assignee thereof in any way, the plaintiff could not maintain his action.

The judge refused so to rule, but ruled that the plaintiff was entitled to recover; and directed the jury to return a verdict for the plaintiff. The defendant alleged exceptions.

ENDICOTT, J. The plaintiff, being the owner of the estate, leased the same for the term of ten years to Heyer Brothers; and they, on the same day, leased a part of the premises to the defendant for a term of five years. It is to be inferred from the subsequent agreement between the plaintiff and Heyer Brothers that other underleases were made. Before the expiration of the underlease to the defendant, Heyer Brothers assigned it to the plaintiff; who at the same time indorsed on the original lease to Heyer Brothers an agreement releasing them from rent and accepting the surrender of their lease and the premises, "but without prejudice to the leases of parts of the premises assigned to him." This agreement was made in consideration of the assignment to the plaintiff of the underleases by Heyer Brothers.

The intention of the parties is plain. Heyer Brothers having made underleases of parts of the premises which the plaintiff was willing to take, and desiring also to surrender the reversion in these leases to the plaintiff, which he was willing to accept, the underleases were assigned, including the defendant's, and the surrender of the original lease accepted without prejudice to the underleases. They evidently did not intend that the rights of the plaintiff under the assignment, or the estates of the sub-lessees, should be destroyed by the surrender, for the language of the acceptance carefully provides for both. The purpose was to put the plaintiff precisely in the position of Heyer Brothers. This intention, as expressed in the papers they have executed, will be carried out, if consistent with the rules of law, and we are of opinion that it is.

The plaintiff brings this action, as assignee of the lease, to recover upon the defendant's covenant to pay rent; and it is well

settled that when a lease is assigned without the reversion, the privity of contract is transferred, and the assignee may sue in his own name for the rent accruing after the assignment. *Kendall v. Carland*, 5 Cush. 74; *Hunt v. Thompson*, 2 Allen, 341. The only objection suggested to the plaintiff's right to recover is the surrender of the lease of Heyer Brothers to the plaintiff; and the claim is, that the rent due from the defendant is an incident of the reversion in Heyer Brothers, and, the reversion having been extinguished by the surrender, all remedies incident to it are taken away. But rent is not necessarily an incident to the reversion, so that it cannot by the acts or agreements of the parties be separated from it. In a general grant of the reversion, the rent will pass as incident to it. *Burden v. Thayer*, 3 Met. 76. But the reversion may be granted and the rent reserved, or the rent may be assigned, reserving the reversion, if such is the intention of the parties as expressed in the words they use. Lord Coke says that fealty is an incident inseparably annexed to the reversion, and the donor or lessor cannot grant the reversion and save to himself the fealty; but the rent he may except, because the rent, though it be an incident, yet is not inseparably incident. Co. Lit. 143 a, 151 b; 3 Cruise Dig. 337; *Demarest v. Willard*, 8 Cow. 206. Heyer Brothers therefore could have granted their reversion, or surrendered it to the plaintiff and reserved the rent accruing upon the underleases. In such a case, their relations to the sub-lessees would not be changed by the grant or surrender of the reversion, and they could have recovered rent of this defendant upon the covenants of its lease. Having that estate reserved in the premises, they could have assigned it to a third party or to the plaintiff, and the assignment would have been good, and the defendant would have been bound to pay to the assignee rent for the estate held under its lease. This form of proceeding was not adopted by the parties, but the same result was accomplished. As the assignments were simultaneous with the surrender, Heyer Brothers did not in terms reserve the rent to themselves, but the plaintiff accepted the surrender in consideration of the assignment, with the express stipulation that it should not prejudice the underleases assigned to him; that is, should not invalidate the assignment, or affect the rights of the parties holding the leases.

The case is not presented, what would be the rights of Heyer Brothers against this defendant; or what would be the rights of the plaintiff, if he had not taken an assignment of the underleases, and had accepted a surrender without qualification. The two cases of *Grundin v. Carter*, 99 Mass. 15, and *Webb v. Russell*, 3 T. R. 393, relied on in support of the proposition of the defendant, have no application to the facts here presented. *Exceptions overruled.*¹

¹ Compare *Appleton v. Ames*, 150 Mass. 34; *Williams v. Michigan Central R. Co.*, 133 Mich. 448; *McDonald v. May*, 96 Mo. App. 236; *Hessel v. Johnson*, 129 Pa. 173.

M'MURPHY v. MINOT

4 N. H. 251. 1827.

THIS was an action of covenant broken on an indenture made the 12th July, 1811, by which the plaintiff demised to Seth Daniels, a certain tract of land to hold during her natural life, and the said Daniels covenanted with the plaintiff to pay her, on the first day of May, annually, a rent of \$30.

The action was brought against the defendant, as assignee of Daniels, for the said rent from 1st May, 1817, to the 1st May, 1825, and was submitted to the decision of the court upon the following statement of facts.

The indenture was made as stated in the declaration, and Daniels having entered under it, afterwards conveyed all his estate to one Gilman Dudley, who, on the 3d April, 1822, conveyed the land to the defendant in fee and in mortgage. Dudley remained in possession and took the profits until his death in October, 1822, and after his decease his administratrix remained in possession, taking the profits until April, 1824. On the 16th April, 1824, a tenant entered upon part of the land under an agreement with the defendant to pay rent to him in case the land was not redeemed.

On the 23d April, 1825, the administratrix of Gilman Dudley conveyed to the defendant the right in equity to redeem the land mortgaged as aforesaid, and the defendant's said tenant has been in possession of the whole tract from that time to the commencement of this action, on the 22d March, 1826.

All the interest which the plaintiff ever had in the land was an estate for her own life, and the reversion was in Daniels.

RICHARDSON, C. J. It has been urged in behalf of the defendant in this case that the plaintiff is not entitled to recover anything, because the rent was never demanded of Minot. The law on this point is well settled. When a lessor proceeds for a forfeiture or to enforce a penalty he must show a demand of a rent on the very day it was payable. But in an action of covenant no demand is necessary. 18 Johns. 447, *Remson v. Conklin*; Com. Dig. Rent, D. 4; 2 N. H. Rep. 163, *Coon v. Brickett*.

We are therefore of opinion that this objection to the action cannot prevail.

It has also been urged that this action cannot be maintained, because the particular estate and the reversion having become united in the same person, the particular estate is merged and the rent extinguished. Had the rent in this case been incident to the reversion, it is clear that this action could not be maintained. 2 N. H. Rep. 454, *York v. Jones*. But it is well settled that the rent is not inseparably incident to a reversion. Co. Lit. 143 and 47 a; 2 Bl. Com. 176.

Rent may be reserved upon a grant of a man's whole estate, in which case there can be no reversion.

The case of *Webb v. Russell*, 7 D. & E. 393, which has been cited by the defendant's counsel does [not] apply in this case. It was there held that where rent is incident to a particular reversion, when that particular reversion is merged, the rent is extinguished. But in this case the rent was never incident to the reversion. The plaintiff granted her whole estate reserving a rent, and she had no reversion to which it could be incident.

In order to maintain this ground it must be shown that when he who has a reversion takes a lease of the particular estate and covenants to pay rent, such rent is extinguished by the union of the particular estate and the reversion. But this proposition cannot be sustained by any reason or authority, and we are of opinion that this ground of defence fails altogether.

But it is further contended on the part of the defendant that being only a mortgagee he cannot in any event be held liable for the rent until he took possession under the mortgage, and the case of *Eaton v. Jaques*, Doug. 438, is cited as an authority. But that decision has been long questioned, 7 D. & E. 312, and in 1819 the question came before all the judges of England, and a great majority were of opinion that when a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him and he becomes liable on the covenant for the payment of rent, though he has never occupied or become possessed in fact. 1 Brod. & Bing. 72, *Williams v. Bosanquet et al.*

In this State it has been repeatedly decided that a mortgage in fee vests in the mortgagee the whole legal estate; the necessary consequence of which seems to be that such a mortgagee must be liable for the performance of covenants running with the land. And we think in this case the defendant is liable for any rent that became due after his mortgage was executed.

In considering this case, the question occurred to us whether the liability of the defendant could be affected by the circumstance that the rent was reserved upon a grant of the freehold, while the conveyance to him was in fee. But we find that it has been decided that covenant will lie against the assignee of part of an estate for not repairing his part, for it is devisable [divisible], and follows the land. Cro. Car. 222, *Congham v. King*; 2 East, 580.

And we are not able to discover any reason why he who takes a larger estate should not be bound by a covenant running with a less estate which is parcel of the larger.

On behalf of the plaintiff it has been argued that the defendant is liable in this action, not only for the rent which has become due since he became owner of the land, but the rent which became due before that time.

The cases which have been cited by the defendant's counsel seem to show that the law is not so.

It is another argument in favor of the defendant, that when the action is against an assignee, it is usual to allege in assigning the breach of the covenant, that the breach happened after the assignment. 2 Chitty's Pl. 191; Lilly, 134; 6 Johns. 105, *Dubois v. Van Orden*; Carthew, 177; 2 Ventris, 231.

It is said in Woodfall, 274 and 338, that an assignee is liable for arrearages of rent incurred before, as well as during his enjoyment; but he cites no case in which it has been so decided, and offers no argument in support of the propositions, and we are of opinion that this is not law, and there must be judgment for the plaintiff for the rent which has become due since the 3d of April, 1822.

Judgment for the plaintiff.

HUGHES v. ROBOTHAM, EXECUTOR

Cro. Eliz. 302. 1593. .

ASSUMPSIT. That whereas the 14th April, &c. the plaintiff was possessed of a lease for years, and the testator was possessed of the reversion for years, the testator, in consideration the plaintiff would surrender to him all his estate, promised to give him thirty pounds; and alledges *in facto*, that 20th April, &c. he surrenders, &c. Upon *non assumpsit* it was found for the plaintiff.

Foster moved in arrest of judgment, FIRST, It was not alledged that he was possessed of the entire term at the time of the surrender; and it may be he had assigned part of it before to another.

SECONDLY, Both parties are termors; one in possession, and the other in reversion: and a termor cannot surrender to a termor, for one estate cannot drown in the other.

As to the first, all the COURT held clearly that the declaration is good; for it shall not be otherwise intended, but that the estate did continue; and it being but an inducement, it need not be so precisely alledged.

To the second, POPHAM said, it is clear that he who hath an estate for ten years, may surrender to him that hath an estate for twelve years; and the estate is drowned, and the other shall come in possession; and there is no doubt but a surrender to him that hath a greater estate for years is good, as to him that hath an estate for life, which GAWDY did expressly affirm; and here it standeth indifferent, if the reversioner had a greater estate for years or not: but if one be lessee for twenty years, and he let the land for ten years, and he surrenders to him that hath the residue of the term, this is good to convey his interest, but not to drown the estate, but he shall have the twenty years as before: otherwise it is of a surrender to another man that hath the reversion for years.

And POPHAM conceived, that if the testator had the reversion for

a less number of years, yet the surrender is good, and the estate shall drown in it. And if a man be lessee for twenty years, and the reversion is granted for one year to another, who grants it to the lessee for twenty years, this is a surrender of the first lease for twenty years, and is as if he had taken a new lease for a year of his lessor.

Quod FENNER, Justice, affirmed; and said the surrender was good, although the reversion was for a less term for years; for here are several terms out of the reversion, and one cannot stand with the other; but coming together, one shall drown the other: and the number of years is not material; for as he may surrender to him who hath the reversion in fee, so he may to him that hath the reversion for a lesser term: but when lessee for twenty years, maketh a lease for ten years, who surrenders; this cannot drown in the other, because it was not to commence until the term expired. — And it was adjudged accordingly for the plaintiff.¹

SECTION IV

TERMINATION OF THE RELATION

WHITLEY v. GOUGH

Dyer 140 b. 1557.

In trespass between Whitley, widow, and Gough, there was a demurrer in law upon the evidence, where the husband of the plaintiff made a lease by indenture to the defendant for a term of ninety years, and afterwards enfeoffed certain persons, and took back an estate to himself and his said wife in tail; and afterwards the termor took a new lease of the husband for eighteen years only, to commence immediately, by parol; and afterwards the husband died, and his wife ousted the termor. And by the opinion of the judges she may well do this, for the first lease was surrendered and merged in law by the acceptance of the second, &c. See E. 3 Eliz. fol. 200, pl. 62.²

¹ See *Pory v. Allen*, 1 Leon. 303; *Willes v. Whitewood*, 1 Leon. 322; *Dighton v. Greenvil*, 2 Vent. 321; *Stephens v. Bridges*, 6 Mad. 66; 3 Preston, Conveyancing, 177-219.

² *Otis v. McMillan*, 70 Ala. 46; *Edwards v. Hale*, 37 W. Va. 193. Compare *Evans v. McKanna*, 89 Iowa 362; *Oldewurtel v. Wiesenfeld*, 97 Md. 165; *Bowman v. Wright*, 65 Neb. 661; *Donellan v. Read*, 3 B. & Ad. 899.

If a lease is void, its acceptance is not a surrender of a former lease. *Watt v. Maydewell*, Hutt. 104; *Davison v. Stanley*, 4 Burr. 2210; *Doe d. Egremont v. Courtenay*, 11 Q. B. 702; *Doe d. Biddulph v. Poole*, 11 Q. B. 713; *Zick v. Tramways*, [1908] 2 K. B. 126. If *Mellows v. May*, 2 Cro. Eliz. 874, is correctly reported, it must be considered as overruled. Compare *Chamberlain v. Dunlop*, 126 N. Y. 45.

"All the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could

HAMERTON v. STEAD

3 B. & C. 478. 1824.

TRESPASS for breaking and entering a mill, dwelling-house, and close of plaintiff, ejecting him therefrom, and keeping him out of possession for a long space of time. Plea, *liberum tenementum*. Replication, that before the said time when, &c., to wit, on, &c., defendant demised the premises to plaintiff, as tenant from year to year, by virtue of which demise plaintiff entered, and was possessed of the premises, and continued so possessed until and at the said time when, &c. Rejoinder, that after the making of the said demise in the replication mentioned, and before the said time when, &c., the said tenancy, and the estate and interest of the plaintiff in the demised premises, in which, &c., wholly ended and determined. Surrejoinder, that the tenancy, &c., did not end and determine in manner and form alleged in the rejoinder. At the trial, before *Garrow*, B., at the last Spring Assizes for Salop, it appeared that on the 1st of May 1810, the premises in question were demised by the defendant to the plaintiff, as tenant from year to year, and he continued so to hold them until the 25th of September 1815, when notice was given to him to quit on the 1st of May then next. On the 10th of October 1815, by an agreement in writing, made between the defendant of the one part, and the plaintiff and one Moore of the other part, defendant agreed to let and demise unto plaintiff and Moore the premises in question, to hold them unto plaintiff and Moore from the 1st of November then next, for seven years thence next ensuing, at a yearly rent of £159, payable half yearly on the 1st of May and 1st of November. Plaintiff and Moore thereby agreed to pay the rent and all taxes, except the landlord's property tax; and defendant agreed to put all the premises in tenantable repair as soon as conveniency would permit. And the plain-

not have been done if the particular estate continued to exist. The law there says that the act itself amounts to a surrender. In such case it will be observed there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention." *Per PARKE*, B., in *Lyon v. Reed*, 13 M. & W. 285, 306. See *Brown v. Cairns*, 107 Iowa 727, 737; *Brown v. Linn Woolen Co.*, 114 Me. 266; *Flagg v. Dow*, 99 Mass. 18, 21; *Thomas v. Zumbalen*, 43 Mo. 471, 477; *Enyeart v. Davis*, 17 Neb. 228, 236; *O'Neil v. Pearse*, 87 N. J. L. 382, 384; *Van Rensselaer v. Penniman*, 6 Wend. (N. Y.) 569, 578; *Smith v. Kerr*, 108 N. Y. 31.

The cancellation of a lease is ineffective as a surrender. *Rowan v. Lytle*, 11 Wend. (N. Y.) 616; *Roe d. Berkeley v. Archbishop of York*, 6 East 86. Compare *Brewer v. National Bldg. Ass'n.*, 166 Ill. 221; *Walker v. Richardson*, 2 M. & W. 882; *Magennis v. Mac-Cullough*, Gilf. Cas. in Eq. 235.

As to oral surrender of short term leases, see *Logan v. Barr*, 4 Har. (Del.) 546; *Ross v. Schneider*, 30 Ind. 423; *Smith v. Devlin*, 23 N. Y. 363; *M'Kinney v. Reader*, 7 Watts (Pa.) 123; 4 A. L. R. 671 note.

tiff and Moore further agreed to keep the premises in repair, and leave them so at the end of the term; and lastly, it was further agreed that a lease should be forthwith drawn, in which the usual covenants were to be inserted, and particularly that the lessees should not let, set, or assign the premises, or any part thereof, without the lessor's consent in writing. The lessees took possession under this agreement, and Moore continued to occupy the premises jointly with Hamerton until April 1816, and then quitted. In June the same year, defendant not being able to get any rent, a negotiation was entered into respecting the surrender of the premises, but that proved fruitless; and defendant having obtained the keys, took and retained possession of the mill and other premises. For the defendant, it was objected that the new agreement in October 1816 was a lease, and put an end to the original tenancy of the plaintiff; or, at all events, if it was only an agreement for a lease, yet that the agreement, together with the fact of Moore's having been let into possession by virtue of it, as a joint occupier with the plaintiff, worked a surrender in law of the old tenancy. The learned judge reserved the point, and a verdict having been found for the plaintiff, a rule *nisi* to enter a nonsuit was obtained in Easter Term.

ABBOTT, C. J. In *Roe v. The Archbishop of York* [6 East, 86] the occupation by virtue of the new lease took place under a mistaken idea, that it was a good and valid lease; and when that was discovered to be void, the court very properly held that it should not operate as a surrender of the former lease. Here, there is nothing to show that the defendant refused to grant such a lease as was contracted for; and we find, in fact, that a new contract was made to let the premises to two persons instead of one, and that both entered and occupied. The lessor might then have sued both for the rent, although no distress could have been made. It frequently happens, that persons enter and occupy at a rent to be fixed in future. In such cases no distress can be made, but an action may be brought for the rent on a *quantum valebat*. It seems to me, therefore, that in the present case the old tenancy was determined, and a new joint tenancy by the plaintiff and Moore created by that which was done under the agreement with the plaintiff's concurrence.

BAYLEY, J. It is clear, since the passing of the Statute of Frauds, that a subsisting term cannot be surrendered unless by writing or by operation of law. But if a sole tenant agrees to occupy, and does occupy jointly with another, that puts an end to the former sole tenancy. The case of *Roe v. The Archbishop of York* does not apply to this case, for here the agreement connected with the joint occupation by Moore and the plaintiff, made them both tenants and therefore operated as a surrender of the separate tenancy of the latter.

HOLROYD, J. I think that an agreement for a fresh lease would not put an end to a former tenancy, unless a new tenancy were actually created. By taking the document in question not to amount

to a lease, yet the entry and holding by Moore and the plaintiff together under it, created a new tenancy either from year to year or at will; and that, according to *Mellow v. May*, Moore, 636, would terminate the old holding. Perhaps, until a lease was executed, it might not be considered that the two held at the rent mentioned in the agreement, but still it might be a holding under the agreement. For, as was said by my Lord Chief Justice, there might be an occupation on a *quantum valebat* until the execution of the lease, and although no distress for rent could be made, yet still a tenancy would exist. For these reasons it appears to me, that the sole tenancy of the plaintiff had terminated, and that a nonsuit must be entered.

LITLEDALE, J. I am of opinion that the former tenancy of the plaintiff was put an end to by the agreement for a new lease, and the occupation by Moore and the plaintiff jointly in pursuance of that agreement. It is unnecessary to say, whether the instrument in question is or is not a lease, for where parties enter under a mere agreement for a future lease they are tenants at will; and if, rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract. But if no rent is paid, still before the execution of a lease the relation of landlord and tenant exists, the parties having entered with a view to a lease and not a purchase. I therefore concur in thinking that a nonsuit must be entered.

Rule absolute.

DOE d. MURRELL v. MILWARD AND ANOTHER

3 M. & W. 328. 1838.

EJECTMENT to recover possession of a house and premises at Horsham, in Sussex. The demise was laid on the 27th June, 1837. At the trial before *Littledale*, J., at the last Summer Assizes for the above county, it appeared that the defendants were yearly tenants to the lessor of the plaintiff of the house and premises in question; and being desirous of leaving and going to occupy some premises of their own, in order to determine the tenancy, they gave the lessor of the plaintiff a notice to quit, which was in the following words:—

HORSHAM, 23d December, 1836.

We hereby give you notice that we intend to give and deliver up the possession of the messuage or tenement we now hold of you at Midsummer day next.

WILLIAM MILWARD.
ROBERT MILWARD.

To HENRY MURRELL, Horsham.

The lessor of the plaintiff accepted the notice without making any objection to it, but he gave no assent to it in writing. The tenant of the defendants having refused to quit the premises which they intended to remove to, they felt desirous of continuing in the occupation of the plaintiff's house; and having discovered that their tenancy commenced at Christmas instead of Midsummer, they, previously to Midsummer, gave a fresh notice to quit at the Christmas following. A demand of possession having been made on the expiration of the first notice, the defendants refused to deliver up possession, on the ground that their tenancy expired at Christmas and not at Midsummer; and this ejectment was accordingly brought. It was contended at the trial, on the part of the lessor of the plaintiff, that although the notice might be insufficient as a notice to quit, in case the tenancy expired at Christmas, yet it would operate as a surrender by operation of law of the defendants' interest, it being a note in writing within the meaning of the 3d section of the Statute of Frauds. The learned judge left it to the jury to say whether, on the evidence, the tenancy commenced at Midsummer or at Christmas, and the jury found the latter. The learned judge, however, directed a verdict for the lessor of the plaintiff on the point as to the surrender, but gave the defendants leave to move to enter a nonsuit. *Tyndale* having in Michaelmas Term last obtained a rule accordingly, on the authority of *Johnstone v. Huddlestone*, 4 B. & C. 922.

✓ PARKE, B. I am very strongly of opinion that there cannot be a surrender to take place *in futuro*. In *Johnstone v. Huddlestone*, it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldenburgh v. Peaple* [6 C. & P. 212] was much shaken by the decision of this court in *Weddall v. Capes* [1 M. & W. 50]; for, although this precise point is not there determined, yet it is clear that the court were of opinion that the instrument could not operate as a surrender *in futuro*. As to granting a new trial, there appears to have been conflicting evidence as to the time at which the tenancy commenced; but that the jury have determined in favor of the defendant.

ALDERSON, B. There was evidence to show that this was a tenancy commencing at Christmas, and the jury have so found. We cannot therefore grant a new trial. The lessor of the plaintiff can bring a fresh ejectment, if he pleases.

The other barons concurred.

Rule absolute to enter a nonsuit.

✓
FENNER v. BLAKE

[1900] 1 Q. B. 426. 1900.

APPEAL from the county court of Norfolk.

In March, 1895, the defendant became tenant to the plaintiff of certain premises upon an agreement for a three years' tenancy expiring at Lady Day, 1898. Upon the expiry of that term the defendant continued in possession of the premises as tenant from year to year. In December, 1898, he asked the plaintiff to release him from his tenancy, and it was then orally agreed between them that the defendant's tenancy should terminate at Midsummer, 1899, unless in the meantime another tenant were found. With the defendant's assent, a notice board was put up upon the premises stating that they were to let. In February the plaintiff found a purchaser, and, relying upon the defendant's agreement to surrender the premises on June 24, he entered into a contract with the purchaser to sell him the premises and to deliver possession on that date. On June 24 the defendant refused to give up possession. The plaintiff brought ejectment. At the hearing it was contended for the defendant that the agreement to surrender the premises in June, not being in writing, was void, and that his tenancy was consequently still subsisting. The county court judge gave judgment for the plaintiff. ✓

The defendant appealed.

CHANNELL, J. In this case I am of opinion that the judgment of the county court judge must be affirmed. There appear to me to be two grounds upon which the plaintiff is entitled to succeed.

The defendant was a tenant who had an ordinary tenancy from year to year terminable by notice in March. In December, 1898, the defendant, being desirous of getting rid of his tenancy and not having given notice to quit in the following March, had a meeting with his landlord, the plaintiff, when they mutually agreed by parol that the tenancy should be determined in the following June. The question is, What is the effect of that agreement? It is by no means uncommon for a landlord and tenant to agree by parol to a variation of the terms of an existing tenancy, such as an alteration in the amount of the rent, and at all events in cases where the tenancy was such that the contract creating it was not required by law to be in writing, as in the case of a tenancy from year to year, a parol variation of the terms as to the rent would be perfectly good and sufficient in point of law. And if an agreement as to an alteration of the rent may be made by parol, why may not equally an agreement as to an alteration of the date at which the tenancy is to be determinable? It seems to me that the effect of the agreement in December was that the defendant accepted a new tenancy for six

✓ months terminable in June in lieu of the existing tenancy. And if so, then all the authorities agree that the acceptance of a new tenancy works a surrender of the old tenancy by operation of law. On that ground I am of opinion that the plaintiff was entitled to maintain his action.

But there is also another ground which I think is equally applicable, and which I think is not displaced by *Lyon v. Reed*, 13 M. & W. 285, one of the cases on which Mr. Chitty relied. It seems to me that in this case the facts raise an ordinary case of estoppel. ✓ The defendant, having agreed to give up possession of the premises in June, assented to the landlord selling the premises with a right of the purchaser to possession in June. The landlord accordingly sold to a purchaser with a right to possession at that date, and thereby rendered himself liable to an action at the suit of the purchaser if he was unable to give him possession at that date. Under those circumstances it seems clear that the tenant is estopped from saying that his tenancy, whatever it was in fact, was not a tenancy ending in June. It is an invariable practice, when a reversion is put up to auction, for the vendor to state what the terms of the tenancy are and when it expires; and if the tenant is communicated with before the sale and agrees that his tenancy is of such and such a character, and thereupon it is so described, and the sale takes place upon that footing, it is impossible to say that the tenant is not estopped from saying that the tenancy is other than that upon the footing of which he allowed the property to be sold to the purchaser. On this ground of estoppel also I think that the judgment of the county court judge may be supported.

BUCKNILL, J. I am of the same opinion. The effect of the evidence stated in the judge's notes seems to be this — that the defendant asked to be released from his tenancy, and the landlord consented, and they then and there agreed that there should be a new tenancy for six months terminating in June. If that is the effect of it, then the acceptance of the new tenancy amounted to a surrender by operation of law. I also entirely agree with what my brother Channell has said upon the point as to estoppel. Upon both those grounds I think the judgment of the county court judge was right. The appeal must, therefore, be dismissed.

Appeal dismissed.

Leave to appeal refused.¹

¹ See *Warren v. Lyons*, 152 Mass. 310; *Mundy v. Warner*, 61 N. J. L. 395; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628.

✓
NICKELLS v. ATHERSTONE

10 Q. B. 944. 1847.

DEBT on a demise of rooms &c., by plaintiff to defendant for three years from March 1st, 1844, at the yearly rent of £100, payable quarterly in advance; averment, that defendant entered, and was possessed until 1st September, 1845.

Pleas. 1. Traversing the demise. 2. Eviction by plaintiff. 3. Surrender. Traverses of pleas two and three.

On the trial, before *Wightman*, J., at the London sittings after Easter Term, 1846, the following appeared to be the material facts. The rooms were let by plaintiff to defendant under a memorandum of agreement dated 26th February, 1844, on the terms specified in the declaration. The defendant entered, and paid rent for the first two quarters, beginning respectively March 1st and June 1st, 1844. In August, 1844, the defendant removed his property from the rooms and left them, and applied to the plaintiff to take them off his hands. The plaintiff refused. The defendant then asked the plaintiff to let the rooms for him; and the plaintiff said he would try to do so. On 3d September, 1844, the defendant being then absent, the plaintiff applied to his daughter for the rent due on 1st September. In reply, the following letter was written by the defendant to the plaintiff.

EDINBURGH, 11th September, 1844.

SIR, — I heard from my daughter that you expressed your intention to take legal measures against me unless the ensuing quarter rent were paid on the very day commencing the quarter. I consider such a step would be harsh; and under present circumstances it would be utterly useless. It will probably be six months before I can finally leave Scotland, as the greater part of my business connexion lies in this country. I trust, however, that you may be able to let the rooms to some other person, and on better terms.

E. ATHERSTONE.

On 29th September, 1844, the plaintiff, without any further communication with the defendant, let the room in question, together with some others, to a Mr. Bullock, for three years from that date, at £120 a year, payable quarterly in advance. Mr. Bullock paid the first two quarters, but subsequently became insolvent. The present action was then brought, claiming from the defendant the four quarters' rent from September 1st, 1844, to September 1st, 1845, under the agreement of February, 1844; but credit was given to the defendant for the first two quarters' rent, which the plaintiff had received from Bullock.

✓ *Wightman* J., left it to the jury to say whether the plaintiff agreed to the terms offered by the defendant in his letter of 11th September, and accepted Bullock as his tenant in substitution and discharge of the defendant. The jury found that the plaintiff did accept Bullock as his tenant in discharge of the defendant. Verdict for the plaintiff, under the direction of the learned judge, on the first issue, for the defendant on the other issues, with leave to the plaintiff to move to enter a verdict for himself for £50, on either or both the other issues.

A rule *nisi* having been accordingly obtained,¹

LORD DENMAN, C. J., now delivered judgment.

In this case, the defendant being the lessee in possession of the premises, the plaintiff, his landlord, with his consent, let them to a new tenant, and put him in possession, and discharged the defendant from his liability as tenant.

✓ The judge who tried the case held that these facts constituted a surrender by operation of law, and, therefore, a defence against the plaintiff's claim for rent. The correctness of that holding has been brought into question before us in consequence of the opinion expressed by the Court of Exchequer in *Lyon v. Reed*, 13 M. & W. 285, 305–310; but we are of opinion that it is correct. If the expression "surrender by operation of law" be properly "applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued," it appears to us to be properly applied to the present. As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant, the owner of the particular estate in question, is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter.

If the defendant cannot technically be said to be estopped from disputing the validity of the estate of the new tenant, still, according to the doctrine of *Pickard v. Sears*, 6 A. & E. 469, he would be precluded from denying it with effect; and the result is nearly the same as an estoppel. If an act which anciently really was, in contemplation of law, and has always continued to be, an act of "notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like" (*Lyon v. Reed*, 13 M. & W. 309), be required as requisite for a surrender by operation of law, and if the acts of the three parties are re-

¹ Argued before LORD DENMAN, C. J., PATTESON, WIGHTMAN, and ERLE, JJ.

garded together, this requisite is here found. Indeed the notoriety is essentially greater than that which accompanies a parol demise between the same landlord and tenant, which is a clear surrender by operation of law. In the present case three are concerned, and there is an actual change of possession; in the other, two are concerned, and there is no change of possession. This surrender by operation of law has been judicially recognized in each of the superior courts: *Matthews v. Sawell*, 8 Taunt. 270; *Thomas v. Cook*, 2 B. & Ald. 119; *Walker v. Richardson*, 2 M. & W. 882; *Bees v. Williams*, 2 C. M. & R. 581, s. c. Tyr. & G. 23; and held valid at Nisi Prius in *Stone v. Whiting*, 2 Stark. N. P. C. 235, and many subsequent cases. When the decisions on a point are numerous and uniform, and carry into effect the lawful intentions of the parties according to the truth, and are opposed by no principle, the law on the point ought not to be considered doubtful because the reported decisions are only of modern date, as the fact that the reports on the point do not begin till lately may arise from there being no question on the point in earlier times. Indeed, in 1809, it seems probable that a restoration of the possession to the landlord and a discharge of the tenant by him was considered a surrender by operation of law. The defence in *Mollett v. Brayne*, 2 Campb. 103, was shaped on that principle; but, as the evidence failed to show a change of possession by mutual consent of landlord and tenant, the defence failed. In *Whitehead v. Clifford*, 5 Taunt. 518, where there was such change of possession by mutual consent, the defence to a claim for use and occupation succeeded; and the court distinguished the case from *Mollett v. Brayne*, for that reason.

Where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved, as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence. Although we do not assent to the observations upon the line of cases, from *Thomas v. Cook*, downwards, in the learned and able judgment given in *Lyon v. Reed*, 13 M. & W. 285, we wish to express our entire concurrence in the decision of that case. The question there was not upon the estate of the tenant in possession of the premises, but upon the title of the plaintiff as assignee of the reversion; whether a lease of the reversion, granted to Ord and Planta in 1812, for ninety-nine years, could be presumed to be surrendered, from the fact that such lease was found among the deeds of the tenant in fee, who had granted in 1814 a term in the reversion to Osborn and Burt, through whom the plaintiff claimed. There was no change in the possession of the land. No actual change in the possession of the reversion could be made apparent; and the facts stated lead to the conclusion that Ord and Planta did not know of the demise to Osborn and Burt; but the probability is, that the term

in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease.

As the defendant is entitled to our judgment on this point, it is not necessary to consider the effect of his letter as evidence of a surrender. *Rule discharged.*¹

¹ *Triest & Co. v. Goldstone*, 173 Cal. 240, *accord*. See *Kinsey v. Minnick*, 43 Md. 112; *Davison v. Gent*, 1 H. & N. 744.

In *Wallis v. Hands*, L. R. [1893] 2 Ch. 75, N. had in 1884 leased certain land to P. and others. In 1887 N. leased the same and other lands to plaintiff. This was done with the oral assent of the lessees under the lease of 1884. The plaintiff did not enter into possession of the premises covered by the lease of 1884. Chitty, J., said, page 81:—"The plaintiff (as already stated) has never been in possession of the property demised by the lease of 1887; consequently, as between the lessees of 1884 and those claiming under them on the one hand, and the plaintiff on the other, there has been no change of possession. In these circumstances it is contended for the plaintiff, as a proposition of law, that the grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, operates as a surrender in law of the prior lease; and, consequently, that such grant and mere oral assent are sufficient to take the case out of the operation of the 3rd section of the *Statute of Frauds*, which enacts that no leases shall be surrendered unless by deed or note in writing, or by act and operation of law. . . . The question again raises the controversy which subsisted at one time between the Courts of King's Bench and the Exchequer, illustrated by *Thomas v. Cook*, 2 B. & Al. 119, and *Lyon v. Reed*, 13 M. & W. 285, and discussed at length in *Smith's Leading Cases*, 8th ed. vol. ii. p. 884 *et seq.* But it appears to me that this controversy was, so far as concerns the question before me, set at rest by the judgment of the Court of Exchequer in *Davison v. Gent*, 1 H. & N. 744. In *Thomas v. Cook* there was in fact a change of possession, the old tenant *Cook* having gone out of possession when the plaintiff accepted *Perkes* as his tenant. (See the observations of Lord St. Leonards in *Creagh v. Blood*, 3 J. & Lat. 160). In his judgment in *Davison v. Gent* Chief Baron Pollock states the law thus, (1 H. & N. 749): 'It must therefore be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law.' This statement appears to me not to be qualified by any subsequent expressions in the same judgment. It substantially reconciles *Thomas v. Cook*, 2 B. & Al. 119, with the principles enunciated by Baron Parke in *Lyon v. Reed*, 13 M. & W. 285, so far as relates to leases in possession. It is not, perhaps, of any great practical importance in which of the two following ways the proposition of law is stated: (1) there is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents; or (2) the change of possession is a necessary part of the consent. I prefer, however, the first, as being the more correct form. To hold that mere oral assent to the new lease operates as a surrender in law would be a most dangerous doctrine: it would practically amount to a repeal of the *Statute of Frauds*, and let in all the mischief against which the statute intended to guard; the policy of that statute is carried still further by the statute 8 & 9 Vict. c. 106, s. 3, which requires a deed in cases where formerly a mere writing would have sufficed. The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act *in pais*, the law attributing the force of estoppel to certain acts of notoriety, such as livery of seisin, entry, acceptance of an estate, and the

SCHIEFFELIN v. CARPENTER AND OTHERS

15 Wend. (N. Y.) 400. 1836.

THIS was an action of *covenant*, tried at the New York Circuit in April, 1834, before the Hon. *Ogden Edwards*, one of the circuit judges.

The plaintiff declared on a lease under seal, made by him to Edmund T. Carpenter, bearing date 1st April, 1829, demising a dwelling-house and a lot of ground of 5½ acres, situate in the twelfth ward of the city of New York, for the term of *six years*, subject to an *annual rent* of \$325, to be paid quarterly. The lease was a tripartite indenture, Daniel S. Hawkhurst and Daniel Carpenter being parties thereto, and uniting with the tenant in the covenants to be performed on his part; and they were joined as defendants in the suit with the tenant. The defendants, amongst other things, *covenanted* for the payment of the rent; that the tenant should, *during the term*, keep the dwelling-houses, fences and every part of the demised premises in good condition and repair, and, at the expiration of the term, yield them up in like good repair; that he would not remove, injure or destroy any root, plant, bush or tree growing on the premises, or suffer the same to be done; that he would not underlet or assign the premises, either directly or by operation of law, without the written consent of the landlord; and that during the term, the dwelling-house should not be occupied as a public house, inn or tavern, without the like written consent. The plaintiff *assigned, as breaches* of the covenants: 1. That on the 1st July, 1833, there was one year's rent in arrear and unpaid; 2. That on the 1st January, 1831, the tenant permitted the dwelling-house and fences, &c., to fall into bad condition, and to become ruinous and to decay for the want of necessary repairs, and so permitted them to remain until the commencement of the suit; 3. That on the 1st January, 1831, he suffered fruit trees, gooseberry bushes, asparagus roots, and ornamental flowering plants growing on the premises to be lopped, uprooted, removed and destroyed by persons and animals; 4. That from 1st November, 1832, until 1st June, 1833, the dwelling-house was used and occupied as a *public house*, without the consent of the plaintiff. The defendants pleaded the *general issue*, and gave notice of various matters to be proved on the trial.

On the trial of the cause, the plaintiff claimed to recover the *rent* of a quarter of a year, ending 1st July, 1833, and *damages* for breaches of the covenants to keep the premises in repair, and not to injure them, &c. The plaintiff proved that the premises were in

like; and the grant of a new lease to a stranger, with the tenant's assent, and change of possession preceding or following the lease, bring such a case within the scope of the same doctrine, which mere oral assent would not do."

good repair at the date of the lease, and when the tenant went in possession; and that in February, 1833, the dwelling-house was in a ruinous state, the fences prostrated, and the garden wholly destroyed, and that the expense of putting the premises in repair would be between \$400 and \$500. He also proved that the premises had been occupied for a year by two men of the name of Wood and Matthews, who were railroad contractors, and had many persons in their employ who resided on the premises. The defendant *offered to prove* that the plaintiff held the demised premises only *in right of his wife*, and insisted that inasmuch as an action of *waste* might be brought in the name of the *husband and wife* in the character of *reversioners*, the claim of damages for injury to the demised premises ought not to be sustained in the present suit: the evidence was rejected by the judge. The defendants also *offered to prove* that in the autumn of 1831, an agreement was entered into between the plaintiff, the defendant Edmund T. Carpenter and two persons of the names of Mills and Owen, that Carpenter should quit and surrender up the premises to the plaintiff, that the lease declared on should be delivered up and cancelled, and a new lease of the premises should be executed by the plaintiff to Mills and Owens for the term of eight or ten years. That in pursuance of such agreement, Carpenter, in the autumn of 1831, surrendered up the premises to the plaintiff, and paid all the rent then due to the plaintiff, and Mills and Owen took possession of the premises and occupied the same pursuant to such agreement as tenants to the plaintiff, who accepted them as such, and received rent from them. That Mills and Owen occupied the premises until the autumn of 1832, when they left, and were succeeded in the possession by Wood and Matthews, to whom also the premises were let by the plaintiff, and from whom he also received rent: these facts the defendants offered to establish by *parol proof*. The counsel for the plaintiff objected that parol evidence of the alleged agreement or *surrender* of the lease was inadmissible; and also that the evidence, if intended to be urged in discharge of the covenants, ought not to be received, for the reason that a covenant cannot be discharged by parol *before* breach. The judge sustained the objection. The defendants then proved that Mills and Owen went into possession of the premises on the 1st November, 1831, and that previous to their entry, Edmund T. Carpenter (the tenant) put the premises in as good repair as they were in when he entered; they were thus repaired, because Mills and Owen were to take possession. The plaintiff, on being spoken to on the subject, said that he was satisfied with the repairs, if Mills and Owen were satisfied. It was also proved, that after Mills and Owen quit the premises, they were occupied by Wood and Matthews, who had a large number of men in their employment as laborers on a railroad and housed on the premises. Wood and Matthews were in possession six months, and paid rent to the plaintiff.

The counsel for the defendants insisted that the plaintiff was not entitled to recover in this action more than *nominal damages* for the breach of the covenant to keep the premises in repair, and for the injuries done to the premises, as the tenant might put the premises in complete repair before the end of the term, and if he did so the plaintiff would have no cause of complaint; if he did not do so, then the plaintiff would be entitled to bring his action, and to recover damages, and requested the judge so to charge the jury. The judge declined to do so, and, on the contrary, charged the jury that the plaintiff was entitled to his verdict for one quarter's rent, (which was admitted to be all that was due at the bringing of the suit;) and, further, that they were not bound to limit their verdict on the covenant of repairs to *nominal damages*, but might give such sums as, under all the circumstances, they should consider the plaintiff entitled to recover, provided they were satisfied that the defendants had violated their covenants. The jury found a verdict for the plaintiff with \$481.25 damages. The defendants ask for a new trial. The cause was submitted on written arguments.

BY THE COURT. (NELSON, J.) This case has already been elaborately argued upon paper by the respective counsel, and all the authorities and principles bearing upon the points disputed, have been referred to and examined; and were it not for some recent cases in the English courts, that are very confidently urged by the defendant's counsel, it seems to me there would be but little difficulty in disposing of the case. A surrender is defined to be a yielding up of an estate for life or years to him who hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement. Comyn's Landlord and Tenant, 337; 2 Co. Lit. 551; 4 Cruise, 155; 4 Bacon's Abr. 209; Shep. Touch. 300, 307. Before the Statute of Frauds and Perjuries, any form of words without writing, whereby an intention appeared to surrender up the possession of the premises to the lessor or reversioner, was sufficient for that purpose. This was called a surrender in *fact*. There was also a surrender in *law*. It was effected by the acceptance of a new lease of the premises from the lessor, for the whole or a part of the time embraced in the former one, because it necessarily implied a determination and surrender of that lease; otherwise the lessor would be unable to make the second, or the lessee to enjoy it, and it was therefore but reasonable to presume both parties intended to waive and relinquish the benefit of the first one. The second lease, before the Statute referred to, of course need not have been in writing to operate an effectual surrender of the first one. The Statute of 29 Car. enacted "that all leases, estates, interests of freehold or terms of years, or any uncertain interests of, in, to or out of any lands, &c., *made or created* by livery and seizin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only," &c., excepting leases not

exceeding the term of three years from the making thereof. And also, "no leases, estates or interest either of freehold or term of years, or any uncertain interest, &c., of, in, to or out of any messuages, &c., shall be assigned, *granted* or *surrendered*, unless by deed or note, in writing, or *operation of law*." Our Statute (2 R. S. 134, § 6) provides that "no estate or interest in lands, other than leases for a term not exceeding one year, &c., shall hereafter be created, granted, assigned, *surrendered*, &c., unless *by act or operation of law*, or by deed or conveyance in writing," &c., § 8. "Every contract for the leasing for a longer period than one year, &c., shall be void," unless in writing. Since these Statutes, a parol lease in England for more than three years, and in this State for more than one, is entirely void; though if the tenant enters into possession, he shall be deemed a tenant at will, and for the purpose of notice to quit, from year to year, and notwithstanding the lease be void, it may regulate the terms of holding as to rent, time to quit, &c. 5 T. R. 471; Comyn's L. & T. 8; Woodf. 14, 15; 4 Cow. 350; 7 Id. 751. But as a lease for the purposes for which it was given, it is considered wholly void. It is, however, conclusively settled by authority, that the second lease must be a valid one, so as to convey, the interest it professes to convey, to the lessee, and also to bind him to the performance of the covenant or agreement in favor of the lessor, in order to operate as an effectual surrender of the first one. 3 Burr. 1807; 4 Id. 1980, 2210; 6 East, 86; Comyn's Dig. tit. Estate, G. 13; 4 Bac. Abr. 215. Without this, the reason before given for the *implied surrender* would fail, and the intent of the parties be altogether defeated. Instead of being but a surrender of the first lease, it would be a surrender of the whole estate and interest in the premises, and a virtual determination of the existence of any ✓tenancy. Now the ground upon which the surrender in this case is mainly argued is, not that a new lease was given to the original lessee, but that it was given to Mills and Owen with his consent, for the period of eight or ten years. Assuming this, amounts to the same as if given to Carpenter; it is impossible to maintain that any valid lease has been proved in the case, or any lease whatever for a definite period. The most that was offered to be proved was, that Mills and Owen went into possession with the consent of the defendants, under a parol agreement for a lease for eight or ten years; and if it be viewed as an agreement for a lease, or as a virtual lease for that time, it is void under the Statute, and could not be enforced by either of the parties. An implied tenancy at will only was created, which enabled Mills and Owen to hold from year to year, for the purpose of notice to quit, but which they could terminate at any moment they pleased. The agreement and entry in pursuance of it conferred no rights upon the plaintiff, further than to recover his rent while they continued to occupy, and perhaps a quarter's rent, if they abandoned the occupation after the commencement of a quarter and before its termination.

Suppose this agreement had been made with the original tenant, and the defendants can claim no more from it as offered to be proved, could it be contended that it operated as a virtual surrender of the lease for six years, and that the plaintiff could dispossess the tenant on giving six months' notice to quit? This would be the consequence of the doctrine urged in the defence. The tenant would become a mere tenant at will. The authorities already referred to clearly establish that the second lease, to have the effect claimed, must pass the interest in the premises according to the contract, or in other words, carry into legal effect the intent of the parties executing it. 3 Burr. 1807; 4 Id. 1980, 2210; Comyn's Dig. tit. Estate, 9, 12; 6 East, 661; 6 Wendell, 569; 1 Saund. 236, b. n. It is stated by Baron Gilbert, 4 Bacon's Abr. 210, that since the Statute of Frauds the new lease must be in writing in order to operate as an implied surrender of the old one, for it is then of equal notoriety with a surrender in writing. This position is also adopted by Serjeant Williams, in his notes upon the case of *Thursby v. Plant*, 1 Saund. 236, n. b. But as surrenders by operation of law are expressly excepted out of the Statute, as a necessary consequence they are left as at common law; and there it is clear it need not be in writing to have the effect to surrender the old one, even if by deed. 2 Starkie's Ev. 342; 20 Viner, 143, L. pl. 1, n.; 1 Saunders, 236, n. c. I am inclined therefore to think that a valid parol lease, since the Statute, might produce a surrender in law within the reason and principle upon which this doctrine is founded. The true rule seems to be that laid down by Mr. Starkie, 2 Starkie's Ev. 342, as follows: the taking a new lease by parol is by operation of law a surrender of the old one, although it be by deed, provided it be a good one, and pass an interest according to the contract and intention of the parties; for otherwise the acceptance of it is no implied surrender of the old one. ✓

If the first lease in this case has not been surrendered, then there is no ground of defence against the action upon the express covenants contained in it, even if we should concede a legal assignment from the tenant to Mills and Owen, and the acceptance of them expressly or impliedly by the plaintiff. 4 T. R. 98, 100; 1 Saund. 241, n. 5; Woodf. 278; Cro. Car. 188; Comyns's Land. and Tenant, 275, and cases there cited. But the plaintiff stipulated against assignment or underletting unless permission was given in writing, and a parol license is therefore inoperative. 2 T. R. 425; 3 Id. 590; 3 Madd. 218; Platt on Cov. 427. This clause in a lease would be nugatory, if courts should allow parol evidence to control in the matter. Besides, a parol assignment is void under the Statute of Frauds. The case of *Thomas v. Cook*, 2 Starkie's R. 408, is supposed to have a strong bearing upon this one. In that case there was a parol lease from year to year to Cook, who underlet to Parkes. The rent being in arrear, Thomas distrained upon him, and he paid it

by a bill of exchange; on receiving which he declared he would have nothing more to do with Cook. Afterwards, however, he brought his action against him for rent then due. For the plaintiff it was insisted that there was no surrender within the Statute of Frauds. Abbott, C. J., left it to the jury to say, whether the plaintiff had not accepted Parkes as his tenant, with the assent of Cook; and the jury finding in the affirmative, the plaintiff was nonsuited. The court at the ensuing term, when the case was moved, were of opinion there was a surrender by operation of law. They say if a lessee assign and the lessor accept the assignee of the lessee as his tenant, *that* in point of law puts an end to the privity of estate, and an action of debt cannot be brought to recover the rent. That I admit to be true, but if the lease had been in writing, according to the cases above cited, a suit might still be maintained upon the *express covenant in it*, though the privity of estate was gone. Besides, the assignment was void as such under the Statute of Frauds. 1 Campb. 318; 5 Bing. 25; Comyn's Land. & Ten. 55, and cases there cited: Woodf. 277. Again, the court say it is a rule of law, that the acceptance of a subsequent lease by parol operates as a surrender of a former lease by deed. That is true under the circumstances we have before endeavored to explain, and is undoubtedly the legal ground upon which that case may be maintained. The case sufficiently shows that the implied parol demise to Parkes was a valid one to the extent intended by both parties: the one to Cook was a lease from year to year, and the acceptance of Parkes, as tenant in his place, impliedly gave him the same tenure and term; no writing was necessary for that purpose. This is the ground upon which the case is said to stand by the court, in commenting upon it in a subsequent term. 4 Barn. & Cres. 922.

In the case of *Grimman v. Legge*, 8 Barn. & Cres. 324, the lease was by parol for *one year*, for the first and second floor of a house; a dispute having arisen before the end of the year, the tenant said she would quit. The landlord said he would be glad to get rid of her. She accordingly left the premises, and possession was taken by him. The facts were submitted to the jury, to presume a rescindment of the original contract between the parties. The case of *Stone v. Whiting*, 2 Starkie, 235, is precisely like the case of *Thomas v. Cook*, and stands upon the same principle. In the case of *Whitehead v. Clifford*, 5 Taunt. 518, the lease was by parol from year to year, and stands upon the footing of *Grimman v. Legge*. In the case of *Hamerton v. Stead*, 3 Barn. & Cres. 478, a tenant from *year to year* entered into an agreement in writing for a lease to him and another, and from that time both occupied. It was held that the new agreement, coupled with the joint occupation, determined the former tenancy, and operated as a surrender in law, though the lease contracted for was never granted. If the new agreement and occupation were viewed as a tenancy from year to year, which was

of equal tenure with the first lease, there was at least no hardship in this decision. The judges obviously were somewhat embarrassed in their endeavors to place the case upon principle, and some of their observations conflict with the case in 6 East, 86, which they admitted to be good law. The first case was by parol from year to year, and might well have been put upon the footing of the cases to which I have referred, where the facts were submitted to the jury to find the first contract rescinded.

The law seems to be well settled, that under a *covenant to repair* like the one in question, the landlord need not wait till the expiration of the term before bringing an action for the breach, under an idea that the tenant may, before he leaves the premises, put them in good condition. 1 Barn. & Ald. 584; 2 Ld. Raym. 803, 1125; 1 Salk. 141; Platt on Cov. 289; Comyn's Land. & Ten. 210. If the covenant was only to leave the premises in as good a condition as the tenant found them, it seems an action would not lie till the end of the term. Shep. Touch. 173; Platt on Cov. 289.

The defendants cannot question, in this action, the title of the landlord. The action is upon an express covenant between the parties, and the suit, if sustained at all, must be by the plaintiff alone.

New trial denied.

ADAMS v. BURKE

21 R. I. 126. 1898.

COVENANT by lessor against lessee for rent due under a written lease which had been assigned by the lessee, the lessor having accepted certain of the rent from the assignee. Heard on defendant's petition for a new trial.

PER CURIAM. The testimony fails to show, as claimed by the defendant, that the plaintiff was notified of the assignment of the lease and accepted the assignee as lessee in place of the defendant. The law is well settled that a mere assignment of a lease and an acceptance of rent by the lessor from the lessee do not preclude the lessor from maintaining an action of covenant against the lessee on his covenant for the payment of rent. *Almy v. Greene*, 13 R. I. 350; *Fletcher v. McFarlane*, 12 Mass. 43; *Wall v. Hinds*, 4 Gray, 256; *Auriol v. Mills*, 4 Durn. & E. (Term Rep.) 94. The direction of the Common Pleas Division to return a verdict for the plaintiff was correct.

Defendant's petition for new trial denied and dismissed, and case remitted to the Common Pleas Division with direction to enter judgment on the verdict.¹

¹ *McKee Cash Store v. Otero*, 19 Ariz. 418; *Bonnetti v. Treat*, 91 Cal. 223; *Cuesta v. Goldsmith*, 1 Ga. App. 48; *Harris v. Heackman*, 62 Iowa 411; *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220; *Rees v. Lowy*, 57 Minn. 381;

DODD AND DAVIES v. ACKLOM

6 M. & W. 672. 1843.

ASSUMPSIT for use and occupation. Plea, *Non assumpsit*.

At the trial before *Erskine*, J., at the sittings for Westminster in last Trinity Term, the following facts were proved in evidence.

On the 7th of October, 1842, the plaintiffs, by lease in writing signed by both of them, demised a house to the defendant, at a yearly rent, payable quarterly. The defendant's wife received the key from the wife of the plaintiff Dodd, and the defendant entered into possession, and after communicating with Dodd upon the subject, began to whitewash and paper part of the premises. The defendant afterwards discovered that a considerable amount of rent was in arrear to the superior landlord; that the land-tax and water-rate were also in arrear; and he thereupon remonstrated with Dodd. About Christmas the key of the front door was delivered up by the defendant's wife to Dodd, and accepted by him. It was contended on the part of the plaintiffs that this was not sufficient to constitute a surrender by act and operation of law, under the 29 Car. 2, c. 3, § 3, especially as it was not shown that the defendant's wife had authority to give up the key; and that, at any rate, a surrender to one plaintiff would not inure as a surrender to both.

The learned judge told the jury that the plaintiffs were entitled to a verdict, unless the jury thought that the plaintiffs had, by some act, prevented the defendant from having a beneficial occupation of the premises; or unless the tenancy had been put an end to by all parties before any rent became due; and, further, that if the jury thought that the defendant's wife had authority from her husband to deliver up the possession by giving up the key, and had done so, and that the plaintiff Dodd had accepted it, also having authority from the other plaintiff so to do, that would amount to a surrender of the tenancy by act and operation of law, and the defendant would be entitled to a verdict.

The jury having returned a verdict for the defendant.

TINDAL, C. J. Two questions arise in this case. First, whether,

Edwards v. Spalding, 20 Mont. 54; *Bouscaren v. Brown*, 40 Neb. 722; *Decker v. Hartshorn*, 60 N. J. L. 548; *Laughran v. Smith*, 75 N. Y. 205; *McFarland v. Mayo*, 162 Pac. (Okl.) 753; *Frank v. Maguire*, 42 Pa. 77; *Kanawha Co. v. Sharp*, 73 W. Va. 427; *Bailey v. Wells*, 8 Wis. 141, accord. See *Saulpaugh v. Hamilton*, 64 Colo. 139; *Houston v. Barnett*, 90 Oreg. 94.

But acceptance of rent combined with other circumstances has been held to create a surrender. *Morgan v. McCollister*, 110 Ala. 319; *Brown v. Hallett*, 190 Pac. (Colo.) 429; *Fry v. Partridge*, 73 Ill. 51; *Keeley v. Beenblossom*, 183 Iowa 861; *Rogers v. Dockstader*, 90 Kan. 189; *Hutcheson v. Jones*, 79 Mo. 496; *Wells v. Warnick*, 198 S. W. (Mo. App.) 1121; *Washoe Bank v. Campbell*, 41 Nev. 153; *Jamison v. Reilly*, 92 Wash. 538. And see *In re Sherwood*, 210 F. R. 754; *Kinsey v. Minnick*, 43 Md. 112.

under the circumstances, there was a surrender of the premises by the tenant by act and operation of law, within the meaning of the Statute of Frauds; and secondly, whether, supposing there was such a surrender, Davies, one of the joint lessors, was affected by that surrender. And I am of opinion, upon the evidence, that there was a sufficient surrender, and that Davies was bound by the acts of Dodd, his co-lessor. There was undoubtedly no formal surrender by deed or note in writing; but it is clear there may be a surrender by act and operation of law, where there is a change of possession. By the old law, before the Statute of Frauds, if a lessee took a new lease from the lessor it would operate as a surrender of the former term, although the second lease were for a shorter period than the first, or were by parol; and the reason is, that the lessee, by taking the second lease, affirms that the lessor is able to make such lease.¹ So, where there has been a change of possession, with the assent of both parties, it amounts to a surrender of the term by act and operation of law.

The present case is not like *Doe d. Huddleston v. Johnston* [M'Clel. & Y. 141], where the second tenant was never substituted, nor *Mollett v. Brayne* [2 Campb. 103], where the landlord told the tenant that he might go, but that he would hold him to the payment of rent. Here, there is evidence that after a lease in writing had been executed, the tenant finding that the ground-rent and land-tax were due, and that there was a dispute as to the payment of the water-rate, felt a disinclination to continue in possession. I am not prepared to say that if the landlords had known this state of facts, and had concealed them from the tenant, there might not have been an action for deceit by the tenant against the landlords. It is true that the defendant enters into possession, and that he proceeds to paper and whitewash some part of the premises; but some time about Christmas his wife delivers the key of the house to the plaintiff Dodd. Now the first question is, Was that a change of possession? The jury have found there was such a change, by consent of both parties; and that amounts therefore to a surrender by act and operation of law. The key was shown to have been delivered to the plaintiff Dodd; and when a given state of things has been shown to exist, the law will assume that it continues unless a change be shown. The natural presumption, therefore, is that the key remained in Dodd's possession.

One objection that has been taken is, that the defendant's wife could not bind her husband by the delivery of the key. But we must look at all the circumstances of the case. The key was first delivered by the wife of the plaintiff Dodd to the wife of the defend-

¹ Plowd. 106, 107 a. But there, both Portman, J., and Bromley, C. J., state that it is a surrender *by the course of the common law* (viz. by the act of the parties acting according to the common law), not a surrender *by operation of law*.—REP.

ant; and from her Dodd afterwards received the key back. I think therefore there is no objection on the ground of the want of authority in the defendant's wife.

Then the last question is, whether the plaintiff Davies is affected by the acts of Dodd. And here we must look to the circumstances again. Davies signs the lease, it is true, but he is then lost sight of. Dodd always acts in the business. The application by the defendant as to the repairs, is made to Dodd. And there are many other circumstances in which Dodd was concerned and not Davies. I think it was properly left to the jury to say whether Dodd was not to conduct the whole business. Upon the whole therefore it appears to me that the case was properly submitted to the jury.

With respect to the evidence, there is no affidavit to negative the receipt of the key by Dodd; and I see no reason to disturb the verdict upon this ground.

I think the rule must be discharged.

COLTMAN, J. I am of the same opinion. Upon the question of surrender by operation of law, there is *prima facie* a good deal of difficulty as to the precise meaning of the term as used in the Statute of Frauds. Probably the expression referred to such surrenders as were then known, and which are mentioned in Plowden.¹ Subsequent cases have gone much further than the old doctrine. In *Thomas v. Cook*, 2 B. & A. 119; 2 Stark. N. P. C. 408, it appeared that the plaintiff had originally let the premises to the defendant as tenant from year to year. After the defendant had resided there for some time, he underlet them to one P. commencing at Christmas, 1806. At *Lady Day*, 1807, the defendant distrained upon P. for rent in arrear. Rent being then due from the defendant to the plaintiff, the latter gave notice to P. not to pay the rent to the defendant, but to pay it to him; and upon the defendant's refusing to take P.'s bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from the defendant to him, saying that he would not have anything more to do with the defendant; and in the following October, the plaintiff himself distrained upon the goods of P. for rent in arrear. It was held that these circumstances constituted a valid surrender of the defendant's interest by act and operation of law, within the Statute of Frauds. So, in *Grimmann v. Legge*, 8 B. & C. 324; 2 M. & R. 438, it was also decided that where there is an agreement between the landlord and tenant that the latter shall deliver up possession, and possession is delivered up accordingly, that is a surrender by operation of law. In the present case I think there was sufficient evidence of such a surrender. *Mollett v. Brayne* and *Doe d. Huddleston v. Johnston* are quite distinct from *Grimmann v. Legge*. In *Mollett v. Brayne* it was not shown that the landlord took possession. In *Doe d. Huddleston v. Johnston*

¹ In *Fulmerston v. Steward*, p. 106. And see Bac. Abr. tit. Leases and Terms for Years (S) 3.—REP.

the agreement to put an end to the tenancy, was never carried out. In the present case the jury have found that the key was delivered up with the intent that the landlord should resume possession; and that amounts to a surrender by operation of law.

Then comes the further question whether Davies was bound by the act of Dodd. Upon this point I have found a little difficulty in making up my mind; but it appears to me upon the whole — the management of the business being left entirely to Dodd — that there was evidence to warrant the jury in inferring that Dodd had authority to act for his co-lessor Davies. That puts the case out of the rule in *Reid v. Tucker* [Cro. Eliz. 802], which is applicable only where one joint tenant acts for the other without authority, or where the only authority is that which is to be implied from the relation in which they stand to each other as such joint tenants.

As to the weight of evidence, I am of opinion that the verdict was correct.

MAULE, J. I also think this rule must be discharged. As to the evidence, I think it was sufficient to support the verdict. As to the alleged misdirection, I think there was none. This was an action of assumpsit for use and occupation, in which the plaintiffs say that the defendant is indebted to them for the occupation of certain premises. The defendant denies his liability. The question is, whether, on a certain day — namely on the day on which by the original lease the rent would fall due — the defendant was occupying the premises with the consent of the plaintiffs so as to give rise to an implied promise on his part. Now if one of the plaintiffs had put the defendant out of possession, it might be a question whether, it being a joint contract, they could both sue upon it. But supposing there was an authority on the part of Dodd to act for Davies in accepting the key, then there is no doubt that there was a surrender of the premises by operation of law. It seems clear, from all the circumstances, that Dodd, being the managing owner, was satisfied with the authority of Mrs. Acklom to give up the key; and that is quite sufficient against his joint tenant.

ERSKINE, J. Having the sanction of the rest of the court for the way in which I left the case to the jury, I shall say nothing as to the law. And as to the verdict, I am by no means dissatisfied with it.

*Rule discharged.*¹

¹ See *Rosenblum v. Uber*, 256 F. R. 584, 589; *Fehring v. Wagner-Stockbridge Co.*, 61 Colo. 359; *Withers v. Larrabee*, 48 Me. 570; *Newton v. Speare Co.*, 19 R. I. 546, ante p. 298. Compare *Ledsinger v. Burke*, 113 Ga. 74; *Reeves v. McComeskey*, 168 Pa. 571; *Phené v. Popplewell*, 12 C. B. N. S. 334; *Oastler v. Henderson*, 2 Q. B. D. 575.

PEOPLES EXPRESS CO., INC., v. QUINN AND OTHERS

235 Mass. 156. 1920.

BILL IN EQUITY, filed in the Superior Court on March 31, 1919, to enjoin the defendants, owners and lessors of a building occupied in part by the plaintiff as lessee, from tearing down the leased premises.

In the Superior Court, the suit was heard by *Jenny, J.*, a commissioner having been appointed under Equity Rule 35 to take the evidence. Material facts found by the judge are described in the opinion. By order of the judge, a decree was entered dismissing the bill with costs. The plaintiff appealed.

DE COURCY, J. The plaintiff, as lessee, seeks by this bill in equity to restrain the defendants, who are the lessors and owners, from doing certain acts in the process of tearing down a building in which the leased premises are situated. The following material facts were found by the trial judge.

The defendants, copartners under the name of Amesbury Associates, executed and delivered to the plaintiff a lease of a store and room overhead, a portion of a building numbered 4 Market Square in Amesbury, for five years from October 1, 1918. The plaintiff sublet a portion of the premises to one Sam Levine, with the consent of the defendants. In March, 1919, the associates desired to erect a new brick building on the site of the leased premises and of adjoining land owned by them, and had plans prepared for that purpose. They had interviews with Levine and one McCarthy (who was duly authorized to act for the plaintiff); and it was orally agreed by all the parties, in substance, as follows: The plaintiff and Levine should surrender possession of the leased premises; the defendants should provide for them, free of rent, until the new building was ready for occupation, a store in which to carry on their business, and bear all the expense of moving their goods and effects to the new location; and they should give the plaintiff and Levine a lease of a store in the contemplated building for a time as long as the remainder of their present term, and at the same rental. McCarthy and Levine visited the store which was to be provided for their use during the construction of the new building, and agreed to accept the same.

After said oral agreement was made, and in reliance thereon, the defendants hired the store for the temporary occupancy of the plaintiff and Levine; entered into a contract with one Watkins in the sum of \$4,450 for the excavation and mason work required for the new structure; and executed a lease to the F. W. Woolworth Company of premises constituting part of the building to be erected and comprising a portion of the location described in the present

lease of the plaintiff. They advertised the old houses for sale and sold them for \$25 each. Watkins, under his contract, began excavating in the rear of the leased building and tearing down the adjoining one, when the plaintiff forbade the defendants from entering upon the leased premises and brought this suit. No objection was made by Levine. He stood by his oral agreement, although according to his testimony, McCarthy urged him to repudiate it as not being binding because not in writing.

A decree was entered dismissing the plaintiff's bill. It is argued by the defendants, besides other matters, that the decree was warranted on the ground that there was a surrender of the plaintiff's estate in the premises by operation of law within the meaning of R. L. c. 127, § 3. The trial judge did not make a finding that there was a surrender, and we are not prepared to say that the facts establish one. Even if we assume that the acts of the defendants were equivalent to taking possession of the leased premises, it does not appear that the plaintiff had abandoned its possession. *Amory v. Kannoisky*, 117 Mass. 351. *Talbot v. Whipple*, 14 Allen, 177.¹

But the judge was well warranted in denying an injunction to the plaintiff in the circumstances here disclosed. McCarthy, who was its treasurer, manager, and owner of substantially all its capital stock, and who, the judge found, was duly authorized to act in its behalf, made a fair agreement with the defendants which he now repudiates, apparently because it was not in writing. There was evidence that when it was proposed to embody in writing the agreement between the plaintiff and Levine, McCarthy said "There is no need of signing this paper, because I will see my lawyer and get him to fix up a paper for Sam to sign, and then there wont be any chance for any law suit between Sam and I;" that he said nothing about any paper between his company and the defendants; and that he told them it was all right, and they might go ahead and make their contracts to erect the building. In reliance on his oral agreement and assurances the defendants in good faith proceeded

¹ In the following cases abandonment of the premises by the tenant and re-entry thereon by the landlord were held under the circumstances to create a surrender. *Shahan v. Herzberg*, 73 Ala. 59; *Armour Co. v. Des Moines Co.*, 116 Iowa 725; *Williams v. Jones*, 1 Bush. (Ky.) 621; *McCann v. Bass*, 117 Me. 548; *Lamar v. McNamee*, 10 Gill & J. (Md.) 116; *Talbot v. Whipple*, 14 All. (Mass.) 177; *Elliott v. Aiken*, 45 N. H. 30; *Miller v. Dennis*, 68 N. J. L. 320; *Hargrove v. Bourne*, 47 Okla. 484; *Hart v. Pratt*, 19 Wash. 560; *Kneeland v. Schmidt*, 78 Wis. 345; *Boyd v. Gore*, 143 Wis. 531. See *Okie v. Person*, 23 App. D. C. 170, 183; *Smith v. Pendergast*, 26 Minn. 318; *Frankel v. Steman*, 92 Ohio St. 197; 4 A. L. R. 672 note.

But re-entry by the landlord merely to care for the property or to repair it is insufficient. See *Banks v. Berliner*, 113 Atl. (N. J.) 321; *Haynes v. Aldrich*, 133 N. Y. 287; *Bowen v. Clarke*, 22 Oreg. 566; *Breuckmann v. Twibill*, 89 Pa. 58; *Milling v. Becker*, 96 Pa. 182; *Smith v. Hunt*, 32 R. I. 326; *Chandler v. Hinds*, 135 Wis. 43.

with their plans. As the trial judge found, "if prevented from tearing down the old building described in the lease to the plaintiff, and constructing a new building on said premises, they would be subject to serious expense, and possibly to considerable litigation." There is some evidence from which it might be inferred that, while giving the defendants the impression that he would make no trouble for them, McCarthy intentionally refrained from putting the agreement into writing with a purpose to take advantage of that fact later. The judge well may have concluded that the plaintiff had estopped itself from setting up as a basis for equitable relief, the fact that its agreement was not in writing. As was said in *Davis v. Downer*, 210 Mass. 573, 576, "Where a person has been induced to make expenditures upon land, to construct improvements thereon or to change his situation materially in reliance upon the performance of the oral agreement and in expectation of the rights to be acquired thereby, refusal to carry out the agreement is not merely deprivation of the rights it was intended to confer, which alone is within the statute of frauds, but is in addition 'an infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.'" *Williams v. Carthy*, 205 Mass. 396. *Banaghan v. Malaney*, 200 Mass. 46. *Fenner v. Blake*, [1900] 1 Q. B. 426. And presumably the trial judge took into consideration the additional fact that the granting of an injunction would operate inequitably to the defendants and subject them to a loss out of all proportion to the actual injury, if any, suffered by the plaintiff. *Levi v. Worcester Consolidated Street Railway*, 193 Mass. 116.

Decree affirmed, with costs.

THOMAS v. COOK

2 B. & Ald. 119. 1818.

ACTION for use and occupation. At the trial of this cause at the London sittings after Trinity Term before *Abbott, J.*, it appeared that the plaintiff had originally let the premises, consisting of a house in Long Lane, to the defendant as tenant from year to year. After he had resided there for some time, the defendant underlet them to one Perkes, commencing at Christmas 1816. At Lady-day 1817, defendant distrained Perkes's goods for rent in arrear. Rent being then due from the defendant to Thomas, the latter gave notice to Perkes not to pay the rent to the defendant, but to him; and upon Cook's refusing to take Perkes's bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from Cook to him, saying that he would not have anything further

to do with Cook. And afterwards, in October 1817, the plaintiff himself distrained the goods of Perkes for rent in arrear. The jury found, by the direction of the learned judge, a verdict for the defendant, on the ground that Thomas had, with the assent of Cook, accepted Perkes as his tenant of the premises. And now

Topping moved for a new trial.

ABBOTT, C. J. By the third section of the Statute of Frauds, it is enacted "that no leases, estates, or interests, either of freehold, terms of years, or any other uncertain interest in any messuages, manors, lands, tenements, or hereditaments shall be surrendered, unless by deed or note in writing or by act and operation of law." And the question in this case is, whether what has been done will amount to a surrender by act and operation of law. Now the facts of the case are these. The plaintiff Thomas had let the premises in question to the defendant as tenant from year to year, and the defendant underlet them to Perkes. The rent being in arrear, the defendant, on Lady-day 1817, distrained the goods of Perkes, who having tendered a bill in payment of the rent which the defendant had refused to receive, the plaintiff then interposed, took the bill in payment, and accepted Perkes as his tenant: and afterwards in October 1817, himself distrained the goods of Perkes for rent then in arrear. I left it to the jury to say whether under these circumstances the plaintiff had not, with the assent of Cook, accepted Perkes as his tenant of the premises, and the jury found that fact in the affirmative. I think, therefore, this amounted to a valid surrender of Cook's interest in the premises, being a surrender by act and operation of law. The consequence is that the plaintiff can have no claim for rent against the present defendant, and that the verdict therefore was right.

BAYLEY, J. If a lessee assigns over his interest, and the lessor accepts the assignee as his tenant, the privity of estate is thereby destroyed, and on that ground it is not competent for the lessor to bring debt against the lessee. Where, indeed, the contract is by deed, there he may bring covenant by the Statute of H. 8. In this case, the landlord has accepted Perkes as his tenant, and must be considered to have made his election between Perkes and Cook. And the case of *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50, is an authority to show that the plaintiff has no right to recover. This was a surrender of Cook's interest in the premises by act and operation of law, and the jury were quite right in presuming that Cook had assented to the acceptance of Perkes as tenant to the plaintiff; for that assent was clearly Cook's benefit.

HOLDROYD, J. It appears from the Statute of Frauds that a surrender, in order to be valid, must be either by deed or note in writing, or by act and operation of law. In *Mollett v. Brayne*, 2 Campb. 103, there was only a parol surrender, and no circumstance existed in that case which could constitute a surrender by act and operation

of law. But in this case, there is not merely a declaration by the plaintiff, that he will no longer consider Cook as his tenant, but there is also the acceptance by him of another person as the tenant, and that acceptance is assented to by Cook. Now, if a lease be granted to an individual, and there be a subsequent demise of the premises by parol to the same person, that will amount to a surrender of his lease. Then the circumstance of Cook having first put in another person as undertenant, and having afterwards assented to a second demise by the plaintiff to that person, will in the present case amount to a virtual surrender of his interest by act and operation of law. Notwithstanding therefore the third section of the Statute of Frauds, I am of opinion, that the facts here found by the jury amount to a valid surrender of Cook's interest, and a re-demise of the premises by the plaintiff to Perkes. In that case there will be no ground for disturbing the present verdict.

*Rule refused.*¹

AUER v. PENN

99 Pa. 370. 1882.

JANUARY 17th, 1882. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY and STERRETT, JJ. GREEN, J., absent.

Error to the Court of Common Pleas, No. 1, of Philadelphia County, of July Term, 1881, No. 18.

Covenant, by Joseph Penn against John Auer, upon a contract of suretyship annexed to a lease. Upon a former writ of error, a judgment entered for plaintiff for want of a sufficient affidavit of defence was reversed, and a *procedendo* awarded: see 11 Norris, 444.

On the trial, before *Biddle*, J., the following facts appeared: On October 15th, 1875, the plaintiff leased a certain house to one Jacob Brown, for the term of five years, at the yearly rent of \$360, payable in equal monthly payments of \$30 each. The lease contained the usual covenants on the part of the lessee to pay the rent as due, &c. At the foot of the lease was the agreement of suretyship, signed and sealed by the defendant, John Auer, whereby he covenanted that the lessee should faithfully perform all the covenants in the lease on his part to be performed, otherwise immediate recourse may be had against the surety without any prior proceedings against the lessee.

The lessee entered, paid his rent regularly to January, 1877, and moved out, without notice to his landlord, on February 13th, 1877, because, as he alleged, of defective drainage: after removal he took the keys to the landlord's agent, J. McGeogh. McGeogh testified that he declined to receive them, and stated that he would hold his

¹ See *Amory v. Kannoisky*, 117 Mass. 351; *Snyder v. Parker*, 75 Mo. App. 529; *Lynch v. Lynch*, 6 Ir. L. R. 131.

surety for the rent, whereupon Brown threw them on the floor and went out. Brown testified that McGeogh took the keys, saying it was all right, but he admitted that McGeogh said he would hold John Auer, the surety, for the rent.

McGeogh sent to Auer the following letters on the days of their date.

PHILADELPHIA, February 17th, 1877.

Office 2228 North Fifth Street.

JOHN AUER, Esq. Dear Sir: The rent of No. 1836 Germantown Avenue was due on the 15th instant, and I would like you would call up and pay it. Brown, the tenant for whom you are security, having removed, of course we will have to hold you for the rent.

Yours, respectfully,

J. McGEOGH.

February 21st, 1877.

JOHN AUER, Esq. Dear Sir: The tenant of 1836 Germantown Avenue having removed, and as under the lease you are security, I shall look to you for the payment of the rent. If you desire it, I shall place a bill on the house and rent it for you; but in no case will we release you until the expiration of the lease. You will take notice that unless I hear from you in this matter within a few days, I shall proceed to rent the house at your risk, holding you, of course, for the rent until the expiration of the lease.

Yours, respectfully,

JAMES McGEOGH,
Agent for Jos. Penn, 2228 North Fifth Street.

February 23d, 1877.

JOHN AUER, Esq. Dear Sir: If I do not hear from you to-day, I shall put a bill on the property 1836 Germantown Avenue to-morrow, still holding you, as before stated, for rent until the expiration of the lease.

Yours, respectfully,

J. McGEOGH, Agent for Joseph Penn.

PHILADELPHIA, March 1st, 1877.

JOHN AUER, Esq. Dear Sir: A party named Frederick Metzger is desirous of renting 1836 Germantown Avenue; he is willing to pay thirty dollars per month. If you have any objection, please let me know. If I do not hear from you by to-morrow morning, I will rent it to him, and still hold you as security.

Yours, respectfully,

JAS. McGEOGH, Agent for Joseph Penn.

PHILADELPHIA, September 15th, 1877.

JOHN AUER, Esq. Dear Sir: Frederick Metzger, present occupant of 1836 Germantown Avenue, is removing. John Riehl, a former occupant of the place, desires to rent it. Unless I hear from you to the contrary, I shall rent it to him, still holding you, of course, for the rent as security on the lease.

Yours, respectfully,

JAMES McGEOGH,

Agent for Joseph Penn, 2228 North Fifth Street.

January 2d, 1878.

JOHN AUER, Esq. Dear Sir: Store 1836 Germantown Avenue is again vacant; there is a party named Sylvester Krieder who wishes to rent it as a barber-shop. If you have no objections I will rent it to him, still holding you, of course, as security under the lease.

Yours, respectfully,

J. McGEOGH,

Agent for Joseph Penn, No. 2228 North Fifth Street.

January 21st, 1878.

JOHN AUER, Esq. Dear Sir: Premises 1836 Germantown Avenue being idle, I shall put a bill on the same, to rent, unless I hear from you to the contrary, holding you, of course, as security under the lease.

Yours, respectfully,

J. McGEOGH, 2228 North Fifth Street.

May 13th, 1878.

JOHN AUER, Esq. Dear Sir: There is a party named William Piersons, who desires to rent the house 1836 Germantown Avenue, for a saloon. I cannot get any more than \$25. If I do not hear from you by to-morrow morning I shall rent it, holding you, of course, under the lease as security.

Yours, respectfully,

J. McGEOGH, 2228 North Fifth Street.

No answers were received to these communications. McGeogh rented the premises to various tenants from time to time, credited the lessee with the rents received from them, leaving a balance due, at the expiration of the term, of \$355, for which this suit was brought.

The defendant presented the following points:—

1. "That if the jury find that the premises leased were unhealthy and untenable by reason of impure air, arising from defective drainage, which existed when the lease was made; that this fact was known to the plaintiff, and he refused to remedy the defect, and that the tenant removed in consequence thereof, the plaintiff cannot recover in this suit. The tenant is not bound to repair defects existing when he leases the premises."

Answer. "I was going to say that that is a proposition of law, which it does not seem to me necessary to answer, in one way or another, here, because there is no testimony to that effect; on the contrary, the testimony on both sides has been that the house was perfectly satisfactory at the time it was leased, that Mr. Brown lived in it about a year afterwards. I do not think the state of facts arises here which makes it necessary for me to answer the point."

2. "If the landlord took possession of the premises, and used or occupied the same, either personally or by a second tenant, he will be estopped from collecting the rent for the same period of the former tenant, unless otherwise agreed between them."

Answer. "The phraseology there is a little ambiguous. 'If the landlord took possession of the premises.' If that means that if the landlord accepted the surrender of the premises and agreed to release the tenant, the proposition is true; but the mere fact, as I have said to you, of the landlord's taking possession of the premises and renting them, after the other party had refused to remain upon them, does not produce the effect that is here asked for. If that is the meaning of the point, I refuse to affirm it."

The learned judge charged the jury, *inter alia*, as follows: "The rule of law is perfectly well settled in this State, that a landlord is not liable for repairs unless there is a special stipulation to that effect in the lease. Any man has a right to take the premises of any other man if he pleases, making any covenant or agreement with the landlord that he pleases, but it is settled that he cannot withhold the payment of the rent on account of the bad condition of the premises.

"The second point that he makes is, that he surrendered possession of these premises. A contract to lease a house, or a contract to take a house, is like any other agreement. After you have made it, one party has no right to put an end to it. No man, after you have made an agreement or contract with him, can come to you and say, 'I will give up this contract.' Unless both parties assent to the giving up of the contract, the contract cannot be broken in that way. Undoubtedly, if the landlord and tenant come together, and a landlord agrees to accept a surrender of the premises, that would end the lease and responsibility of the tenant; but a tenant has no right to go into a landlord's office and say, 'I have done with the house,' and throw the key on the floor of the landlord's office. The landlord is not bound to let the key remain on the floor; he has a perfect right to hang it upon a nail without it being evidence that he accepts the surrender. . . . On the contrary, he says, 'I will hold your surety responsible.' It does not constitute a surrender or an acceptance by the landlord that he takes possession of the property and looks after it, and rents it, because that is for the benefit of both parties.

“ [If a man refuse to continue your tenant, gives up the house into your hands, why then you have a right to put a bill upon the house, and try to rent it, because if you rent it, it is so much saved to Mr. Auer, so much saved to the surety, or the tenant, because you have to give an account of every cent you make out of the house, and certainly it is much better for the tenant that the landlord should rent the house and get something for it than to simply lock the door, and lay by and sue the tenant or the surety for the whole amount of the rent for the whole term for which he has taken it, so that, being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender that he has taken and leased the house.]

“ [In regard to the leasing in the name of Mr. Penn, I see no pertinence in that, one way or the other. I do not see what right he would have to use Mr. Auer's name as landlord any more than he had to use the name of any one of us, and rent any property for us. He did the best, — he was bound to do the best he could for the property — it was quite immaterial under whose name he rented it.] ”

Verdict and judgment for the plaintiff, for the amount claimed. The defendant took this writ of error, assigning for error the answers of the court to his points, and the portion of the charge quoted in brackets.

MR. JUSTICE PAXSON delivered the opinion of the court, February 13th, 1882.

Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term, and sending the key to his landlord. The reason for it is that in the absence of fraud, one party to a contract cannot rescind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice Rogers in *Marseilles v. Kerr*, 6 Wharton, 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. A surrender, a release, or an eviction will undoubtedly relieve a tenant, and it was said by Chief Justice Gibson, in *Fisher v. Milliken*, 8 Barr, 111, that nothing less would do so. This remark, however, was without the authority of the court, and must be regarded as *dictum*. The case in hand does not require us to assert so broad a proposition. There was neither a release nor an eviction here, but the surety claimed to be discharged because after the tenant, who was his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretence that the landlord accepted a surrender; on the contrary, the proof is clear that he declined to do so, and notified the defendant below

that he would hold him for the rent. This notice was repeated on more than one occasion when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from his covenant, and must prove it. When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if any. It was said in *Breuckmann v. Twibill*, 8 Norris, 58, that "taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent." Much more is it to the interest of the tenant for the landlord to rent the premises. If at the same rent, the tenant is entirely relieved; if at less, he is liable only for the difference.

Upon the trial in the court below, the learned judge instructed the jury, as set forth in the second assignment of error, as follows: "If a man refuses to continue your tenant, gives up the house into your hands, why, then, you have a right to put a bill upon the house and try to rent it; because, if you rent it, it is so much saved to Mr. Auer, so much saved to the surety of the tenant, because you have to give an account of every cent you make out of the house; and certainly it is much better for the tenant, that the landlord should rent the house and get something for it, than to simply lock the door and lay by and sue the tenant or surety for the whole amount of the rent for the whole term for which he has taken it; so that, being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender, that he has taken and leased the house."

We see no error in this. It is good sense as well as good law.

We are not aware of any authorities in this State which are in conflict with the foregoing views. Those cited on behalf of the defendant below certainly are not.

The remaining assignments do not require discussion. The fifth does not fully state the ruling of the court below. As it appears in the bill of exceptions it is entirely correct.

*Judgment affirmed.*¹

¹ *Brown v. Cairns*, 107 Iowa 727; *Brown v. Cairns*, 63 Kan. 584; *Olde-*

GRAY v. THE KAUFMAN DAIRY AND ICE CREAM CO.

162 N. Y. 388. 1900.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 5, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived.

This action was brought to recover two months' rent of the premises known as No. 787 Eighth avenue, in the city of New York. In July, 1893, the plaintiff let the said premises to the defendant for ten years from August 1st, 1893, at the yearly rental of \$2,400, payable monthly in advance, and also the extra water rent charged against the defendant for its business. The defendant took possession about July, 1893, and paid rent to November 1st, 1893, but refused to pay for the months of November and December of that year, the rent of which became due and payable on the first days of those months respectively.

The answer, in effect, admits the making of the lease, but denies any indebtedness under it and sets up the eviction of the defendant, a surrender and rescission of the lease, and claims credit for the rent received from the undertenant. On or about the 28th or 29th of October, 1893, the plaintiff had a conversation with Mr. Kaufman, the president of the defendant, upon the demised premises. The plaintiff's version of this conversation is as follows: "They were pulling up the store and the things, and were going to move out. They had not said anything to me about moving out prior to that time. I asked Mr. Kaufman what he was doing, pulling up the store. He said he was going to move out, and I asked him why, and he said because he couldn't make any money, and I told him that he had a lease on it, and that I would hold him responsible for the rent if he went out. 'Well,' he says, 'I am moving out, I don't want to stay where I don't make my rent.'" The defendant moved out and sent the keys of the store to the plaintiff by mail. Plaintiff received them about the 2nd of November, 1893. On the 3d of November, 1893, plaintiff served upon the defendant a notice of which the following is a copy:

wurtel v. Wiesenfeld, 97 Md. 165; *Alsup v. Banks*, 68 Miss. 664; *Rucker v. Mason*, 61 Okla. 270, accord.

See *In re Millings Clothing Co.*, 238 F. R. 58; *Hays v. Goldman*, 71 Ark. 251; *Marshall v. Grosse Clothing Co.*, 184 Ill. 421, 424; *Chase Co. v. Evans*, 178 Iowa 885; *Hickman v. Breadford*, 179 Iowa 827; *Stewart v. Sprague*, 71 Mich. 50, 55; *Bumiller v. Walker*, 95 Ohio St. 344, 355-356; *Hargrove v. Bourne*, 47 Okla. 484, 488; 13 L. R. A. N. s. 398 note. Compare *Jones v. Rushmore*, 67 N. J. L. 157; *Whitcomb v. Brant*, 90 N. J. L. 245; *Hall v. Gould*, 13 N. Y. 127, 134.

"NEW YORK, November 3d, 1893.

"*To the Kaufman Dairy & Ice Cream Co.:*

"Yesterday I received the keys of 787 Eighth Avenue by mail. I hereby notify you that I do not accept a surrender of the premises, and that I intend to hold you responsible for the rent under the lease. I shall let the premises on your account, and hold you for any loss which may be sustained.

"Yours, etc.,
"JOHN GRAY."

The defendant made no answer to this notice. On the 17th of November, 1893, the plaintiff went to Kingston and saw Mr. Kaufman, the president of the defendant, Mr. Spore, the secretary, and a Mr. Bruin. The plaintiff asked Mr. Kaufman for the November rent, and the latter replied that no rent was due; that he had not made a lease; and there was nothing due and he would not pay; that he had given up the store and plaintiff could do what he liked with it. Thereupon the plaintiff started for home. The president and secretary of the defendant went to the railway station and there had a conversation with the plaintiff about compromising the matter by taking the cellar of said premises for fifty dollars a month for the term of the lease if the plaintiff would cancel the same as to the rest of the premises. The plaintiff said he would think over the matter and see what he could do with the remainder of the property, and let them know. The plaintiff testifies that thereafter, and on the 27th of November, 1893, he wrote to the defendant as follows:

"KAUFMAN DAIRY & ICE CREAM Co. :

"GENTLEMEN. — I have an offer for the store you leased from me, 797 Eighth Ave. The parties will pay \$1,500 to the first of May and \$1,600 for three years from May. I think this is about as good an offer as can be expected, considering the times. Please let me know if you will keep the cellar and pay the difference between the \$1,500 and \$2,400 to May, and \$1,600 — \$2,400 after. An early reply will much oblige.

Yours respect. J. GRAY,
"323 Washington Ave."

The plaintiff further testifies that he enclosed this letter in an envelope directed to the defendant at Kingston, N. Y., deposited it prepaid in the post office at Brooklyn and received no reply thereto. The defendant had tenants in the cellar when it left the premises. These tenants attorned to the plaintiff.

On or about the 1st of December, 1893, plaintiff let the premises which had been previously demised to the defendant to one Mary Ann Keogh for the term of three years and five months at an

annual rental of \$1,500 per year for the first five months, and \$1,600 per year for the remaining three years, to be paid in equal monthly installments in advance.

The defendant pleaded eviction, but gave no evidence upon that subject, and upon the trial admitted that it had no excuse for leaving the premises. Kaufman admitted having a conversation with the plaintiff before the defendant left the premises, in which the plaintiff stated that he would hold the defendant for the rent, but denied that he, Kaufman, had stated that the defendant would not stay where it did not make any money. Kaufman also admitted the receipt of the letter dated November 3d, but both he and Spore denied receiving the one dated November 27th. Both admitted the conversation testified to by the plaintiff as having taken place at Kingston, and Spore testified that on that occasion Kaufman stated distinctly that the defendant did not owe any rent; that it had given up and surrendered the premises; that there was some talk at the railroad station about renting the cellar from the plaintiff at fifty dollars per month during the term of the lease, but there was nothing said in that conversation about plaintiff's reletting the premises on defendant's account. Abraham L. Gray, a son of the plaintiff, testified on the latter's behalf that he went to Kingston with his father to see Kaufman and was present at the conversation at the railroad station. He testified that Mr. Spore offered the plaintiff fifty dollars a month for the basement if he would let the defendant off on the store, and the plaintiff replied that he would think it over and let them know. The lease to the defendant contained no provision against subletting, except for "any saloon or liquor business," and contained no provision for a reletting of the premises by the plaintiff in case the defendant vacated the same during the term of the lease.

After the evidence was all in, the parties waived the jury and submitted the facts to the court for decision. The defendant admitted its liability for the November rent, but claimed that it was released as to the December rent by the reletting of the premises to said Mary Ann Keogh on the 1st of December. Upon these facts the court found that the plaintiff was entitled to recover rent for the months of November and December, less the amount received from the undertenants; that the plaintiff refused to accept a surrender of the premises; that the premises were at no time surrendered to the plaintiff, and that the reletting of the premises was done with the assent of the defendant.

WERNER, J. This controversy arises out of the conventional relation of landlord and tenant under circumstances governed by fixed principles of law. The first and most important question in the case is whether the plaintiff's reletting of the premises described in the lease, after the defendant's attempted surrender of the same, changed or affected the legal status of the parties under the original lease.

It is so well settled as to be almost axiomatic that a surrender of premises is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. It has been held in this state that "a surrender is implied, and so effected by operation of law within the statute, when another estate is created by the reversioner or remainderman with the assent of the termor incompatible with the existing state or term." *Coe v. Hobby*, 72 N. Y. 145. The existence of this rule has been recognized in this state in *Bedford v. Terhune*, 30 N. Y. 463, *Smith v. Kerr*, 108 N. Y. 36, *Underhill v. Collins*, 132 N. Y. 271, and in other jurisdictions in *Beall v. White*, 94 U. S. 389, *Amory v. Kannoffsky*, 117 Mass. 351, *Thomas v. Cook*, 2 Barn. & Ald. 119, *Nickells v. Atherstone*, 10 Ad. & El. N. R. 944, *Lyon v. Reed*, 13 M. & W. 306, and Washburn on Real Property, Vol. I., pp. 477, 478. It is conceded that defendant's offer of surrender was declined by the plaintiff, and that after the defendant's abandonment of the premises the plaintiff relet the same in his own name to one Mary Ann Keogh for a term of three years and five months. Such a situation, unqualified by other conditions, would create a surrender by operation of law. We must, therefore, ascertain whether the conduct of the parties takes this case out of the operation of this rule.

It is urged by the learned counsel for the plaintiff that the reletting was done with the consent of the defendant under circumstances which bring the case directly within the rule laid down by Judge HAIGHT in *Underhill v. Collins*, 132 N. Y. 270. In that case the landlord and tenant had a conversation a few days before the latter vacated the premises. The tenant asked the landlord to take the same off his hands. This the landlord declined to do, insisting that he would hold the tenant for the rent and would lease the premises for his benefit. In the case at bar there was also a conversation before the premises were vacated; but in this conversation there was nothing said about a reletting. The plaintiff simply said that he would hold the defendant for the rent. On the 2d of November, 1893, a day or two after defendant's removal, the plaintiff received the keys of the premises. He returned them with a note stating that he would relet on defendant's account and hold it responsible for any loss that may be sustained. To this note the defendant made no reply. On the 17th of November, 1893, the plaintiff and his son went to Kingston and saw Kaufman and Spore. In the conversation which took place between them and the plaintiff there was no suggestion of reletting. The plaintiff made a demand for the rent which was unpaid, and the defendant made an offer of compromise, under which it agreed to take the cellar of said premises at fifty dollars per month if the plaintiff would cancel the lease as to the store. This offer the plaintiff agreed to consider. On the 27th of

November, 1893, the plaintiff wrote to the defendant that he had an offer for the store of \$1,500 per year to the first of the next ensuing May, and \$1,600 per year for three years thereafter. He requested the defendant to let him know if it would keep the cellar and pay the difference between the rent fixed by the lease and the amount offered by the intending tenant. To this letter the defendant made no reply. It will be observed from this brief *resumé* of the facts that there are several distinct features in which this case differs from the Underhill case. In the latter case there was a personal interview before the tenant had vacated, in which the subject of reletting the premises was discussed. Here the subject of reletting was not mentioned until after the tenant went out, and then the suggestion came in a letter to which the defendant made no reply. Obviously the only theory upon which defendant can be held to have assented to the reletting of the premises is that by its silence it acquiesced in the act of the plaintiff. We may assume, although we do not decide, that if the communications upon the subject of reletting had been made verbally in the course of conversation between the parties, even after the tenant had vacated the premises, the rule as to agreements by implication laid down in the Underhill case might be held to apply. But here, as we have seen, the landlord's proposal to relet was in the form of two letters. In the first of these, dated November 3d, he makes the unequivocal assertion that he will let the premises on defendant's account, and will hold it for any loss that may be sustained. Defendant's failure to reply to this letter is followed by a personal interview on the 17th of November, in which there is no reference to a reletting of the premises, and in which defendant's president, after denying any liability for rent, tells the plaintiff to do what he likes with the premises. Then follows the letter of November 27th, informing the defendant of the offer which the plaintiff had received from an intending tenant, and asking defendant if it would pay the difference between the amount offered and the rent reserved in the original lease. It will be observed that, even if we were to give these written communications the same force and effect as verbal statements made in personal interviews between the parties, the facts here are easily differentiated from those in the Underhill case. There the tenant vacated the premises upon the offer of the landlord to relet for his benefit and under such circumstances as to permit the inference that he accepted the offer. Here the landlord's statement to that effect, made after the tenant's abandonment of the premises, is followed by negotiations in which the tenant expresses a willingness to keep the cellar at fifty dollars per month if the landlord will cancel the lease as to the rest of the premises. These steps are succeeded by a communication from the landlord, in which he requests the tenant to decide whether it will keep the cellar and pay the deficit which will arise by an acceptance of the offer which the former then had

under consideration. It may well be doubted whether verbal declarations made in personal interviews between the parties, under the circumstances above narrated, would support the plaintiff's theory of this action. To create a contract by implication there must be an unequivocal and unqualified assertion of a right by one of the parties, and such silence by the other as to support the legal inference of his acquiescence. But it is clear, both upon principle and authority, that we have no right to indulge in the assumption that the letters above referred to have the force and effect of verbal statements made in the presence of the defendant's officers. The rule is precisely to the contrary. It is well expressed in *Learned v. Tillotson*, 97 N. Y. 12, as follows: "We think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law." To the same effect are *Bank of B. N. A. v. Delafield*, 126 N. Y. 418, and *Thomas v. Gage*, 141 N. Y. 506.

It is manifest, therefore, that the act of the plaintiff in reletting said premises under the circumstances referred to operated as an acceptance of the defendant's offer to surrender. The judgment herein can be supported upon no theory that is consistent with the established rules of law. As the views above expressed are decisive of the case, it is unnecessary to discuss the other questions raised by the defendant.

The judgment of the court below should be reversed and a new trial granted, with costs to abide the event.

LANDON, J. (dissenting). The trial court found as facts that "Plaintiff refused to accept a surrender of the premises, and did not accept it, and the premises were at no time surrendered to the plaintiff. The letting of the premises was done with the assent of the defendant." The order of affirmance by the Appellate Division does not state that it was unanimous, but that is not important here, for the record contains evidence tending to support the findings. The evidence tends to show that the defendant intended by its conduct to threaten the plaintiff with the loss of his rent, and thus to coerce him to relet the premises, and then deny its assent, notwith-

standing after its receipt of the plaintiff's first letter, it told the plaintiff he could do as he liked with the premises. The defendant thus replied to the plaintiff's letter, at least so the trial court, in view of all the circumstances, might find, and did find.

PARKER, Ch. J., GRAY, O'BRIEN and HAIGHT, JJ., concur with WERNER, J., for reversal; LANDON, J., reads dissenting memorandum; CULLEN, J., not sitting. *Judgment reversed, etc.*¹

omit

LYON v. REED AND OTHERS

13 M. & W. 285. 1844.

PARKE, B.² This was a special case argued in Easter Term. It was an action of debt by the plaintiff, as assignee of the reversion of certain houses and rope-walks at Shadwell, holden under a lease from the Dean of St. Paul's against the defendants, who are executors of Shakespeare Reed, deceased. The plaintiff claims from the defendants nineteen years' rent, accrued due between Christmas, 1820, and Christmas, 1839, partly in the lifetime of Shakespeare Reed, who held the premises during his life, and partly since his decease, while the premises were in the possession of the defendants, his executors.

The material facts are as follows: The premises in question are parcel of the possessions of the Dean of St. Paul's, and it appears that, on the 26th of December, 1803, the then dean demised a large estate at Shadwell, including the houses and premises in question, to two persons of the names of Ord and Planta (who were in fact trustees for the Bowes family) for a term of forty years, commencing at Christmas, 1803, and which would, therefore, expire at Christmas, 1843. On the 24th of March, 1808, Ord and Planta made an underlease of the houses and rope-walks in question to Shakespeare Reed for thirty-four years, commencing from Christmas, 1807, so that the term created by this underlease would expire at Christmas, 1841, leaving a reversion of two years in Ord and Planta. The rent sought to be recovered is the rent which accrued due on the underlease between Christmas, 1820, and Christmas, 1839. It

¹ See *In re Mahler*, 105 F. R. 428, 433; *Williamson v. Crossett*, 62 Ark. 393; *Welcome v. Hess*, 90 Cal. 507; *Bernard v. Renard*, 175 Cal. 230; *Hesseltine v. Seavey*, 16 Me. 212; *McGinn v. Gladding Dry Goods Co.*, 40 R. I. 348; *Walls v. Atcheson*, 3 Bing. 462. Compare *Leavitt v. Fletcher* note¹ ante, p. 261.

Cases where the landlord entered and offered to relet are: *Joslin v. McLean*, 99 Mich. 480; *Blake v. Dick*, 15 Mont. 236; *O'Neil v. Pearse*, 87 N. J. L. 382, 88 N. J. L. 733; *Banks v. Berliner*, 113 Atl. (N. J.) 321; *Lane v. Nelson*, 167 Pa. 602; *White v. Berry*, 24 R. I. 74; *Eimermann v. Nathan*, 116 Wis. 124.

² The opinion only is given.

appears that, previously to the month of October, 1811, Robert Harts-horn Barber and Francis Charles Parry were appointed by the Court of Chancery trustees for the Bowes family, in the place of Ord and Planta; and by an indenture dated the 3d of October, 1811, indorsed on the lease of 1803, all the property at Shadwell demised by that lease was assigned by Ord and Planta to Barber and Parry, the new trustees. Soon after this assignment, the Bowes family appears to have negotiated with the dean for a renewal of the lease of 1803, and accordingly a new lease was executed by the dean, dated on the 7th of April, 1812, for a term of forty years from Christmas, 1811, and which term would, therefore, endure till Christmas, 1851. Unfortunately this lease, instead of being made to Barber and Parry (the new trustees), in whom the old term (subject to the underlease to Reed) was vested, was made to Ord and Planta, the old trustees; the fact of the change of trustees and the assignment of the 3d of October, 1811, having at the time escaped observation. In this state of things, a private Act of Parliament was passed, enabling the dean and his successor for the time being to grant leases of the Shadwell estate to the trustees of the Bowes family for successive terms of ninety-nine years, renewable forever.

The Act, which is intituled "An Act to enable the Dean of St. Paul's London, to grant a Lease of Messuages, Tenements, Lands, and Hereditaments in the Parish of St. Paul's, Shadwell, in the County of Middlesex, and to enable the Lessees to grant Subleases for building on and repairing that Estate," received the royal assent on the 22d of July, 1812. It begins by reciting the will of Mary Bowes, whereby she bequeathed her leasehold estate at Shadwell, held under the Dean of St. Paul's (being the estate afterwards demised by the leases of 26th December, 1803, and the 7th April, 1812), to Ord and Planta, on certain trusts for the Bowes family. It then recites the lease of the 7th of April, 1812, and after stating that it would, for the reasons therein mentioned, be beneficial for all parties that the dean should be empowered to grant long leases of the Shadwell property, perpetually renewable, and further stating that Ord and Planta were desirous of being discharged from their trust, and that John Osborn and John Burt had agreed to act as trustees in their place; it enacted, that it should be lawful for the dean and his successors for the time being, and he and they are thereby *required*, on a surrender of the existing lease, to demise the Shadwell estate to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years, and at the end of every fifty years to grant a new lease on payment of a nominal fine, with various provisions (not necessary to be stated), for securing to the dean and his successor a proportion of all improved rents to be thereafter obtained. And by the second section of the Act it is enacted, that, immediately on the execution by the dean of the first lease for ninety-nine years to be granted in pursuance of the Act,

the lease of the 7th of April, 1812, should become void. It is plain, from the provisions contained in this Act, that the persons by whom it was obtained were not aware, or had forgotten that, in the month of October preceding, Ord and Planta had assigned their interest in the property to Barber and Parry, the new trustees appointed by the Court of Chancery. In pursuance of the Act of Parliament, by an indenture of three parts, dated the 31st day of August, 1812, and made between the dean of the first part, Thomas Bowes (the party beneficially interested for his life) of the second part, and Osborn and Burt of the third part, the dean demised the Shadwell property to Osborn and Burt for a term of ninety-nine years, and the demise is expressed to be made as well in consideration of the surrender of the lease of the 7th of April, 1812, "*being the lease last existing*," as also of the rents and covenants, &c.

Mr. Bowes, and Osborn and Burt, his trustees, appear to have discovered, before the month of January, 1814, the mistake into which they had fallen, and two further deeds were then executed for the purpose of curing the defect. By the former of these deeds, which bears date the 6th January, 1814, and is made between Barber and Parry of the one part, and the dean of the other part, reciting that, at the time of the granting of the lease of the 7th of April, 1812, the estate and interest created by the original demise of the 20th of December, 1803, was vested in Barber and Parry, and also reciting that the fact of the assignment to them by the deed of the 3d of October, 1811, was not known to the parties by whom the said Act was solicited, it is witnessed, that Barber and Parry did bargain, sell, and surrender to the dean the whole of the said Shadwell estate, to the intent that the term of forty years, created by the lease of the 26th of December, 1803, might be merged in the freehold, and that the dean might execute a new lease to Osborn and Burt according to the said Act. By the other deed, which bears date the 29th of January, 1814, and is made between the dean of the first part, the said Thomas Bowes of the second part, and the said Osborn and Burt, of the third part; the dean, *in consideration of the effectual* surrender of the two prior leases on the 26th of December, 1803, and the 7th of April, 1812, and for the other considerations therein mentioned, demised the Shadwell estate, pursuant to the said Act of Parliament, to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years. The interest of Osborn and Burt, under these two leases to them, has, by various assignments, become vested in the plaintiff; and there is no doubt but that he is entitled to recover the rent in question in this action, if Osborn and Burt would have been so entitled.

Such being the principal facts, we must consider how they bear on the several issues raised by the pleadings. The declaration, after stating the demise from the dean to Ord and Planta in 1803, and the underlease from them to Reed in 1808, goes on to state,

that, by the deed of the 3d of October, 1811, Ord and Planta assigned all their interest in the premises to Barber and Parry, and that the dean, being seised of the reversion expectant on the term of forty years so assigned to Barber and Parry, by the indenture of the 31st of August, 1812, demised the premises to Osborn and Burt for a term of ninety-nine years, by virtue whereof they became entitled to the reversion for that term. The declaration then goes on to state that, by the indenture of the 6th of January, 1814, Barber and Parry assigned their interest to the dean, to the intent that he might grant a new lease to Osborn and Burt; and that afterwards, on the 29th of the same month of January, 1814, the dean, by the indenture of that date, made a new demise of the premises to Osborn and Burt for a fresh term of ninety-nine years, they by the same indenture surrendering the former term created by the demise of the 31st of August, 1812. The declaration then traces the title in the present plaintiff by assignment from Osborn and Burt previously to Christmas, 1820, and so claims title to the rent accrued due after that date.

To this declaration the defendants pleaded six pleas: First, a plea traversing the averment that, at the time of the demise to Osborn and Burt of the 31st of August, 1812, the dean was seised in fee of the reversion. Secondly, a plea traversing that demise. Thirdly, a plea traversing the assignment by Barber and Parry to the dean, to the intent that he might grant a new lease to Osborn and Burt. Fourthly, a plea traversing the surrender by Osborn and Burt of the first term of ninety-nine years. Fifthly, a special plea stating the indenture of the 7th of April, 1812, whereby Ord and Planta became entitled to the reversion for forty years from Christmas, 1811, and so continued until, up to, and after the execution of the indenture of the 29th of January, 1814. Sixthly, a plea traversing the demise to Osborn and Burt by the indenture of the 29th of January, 1814. Issue was joined on all the pleas except the fifth, and to that the plaintiff replied, that, after the making of the lease of the 7th of April, 1812, and before the lease of the 31st of August, 1812, the private Act of Parliament was passed, authorizing the dean, on the surrender of the existing lease, to grant a lease for ninety-nine years to Osborn and Burt; and the replication then avers that the lease of the 31st of August, 1812, was duly made in pursuance of the Act, and that, at the time when it was made, the lease of the 7th of April, 1812, was duly surrendered. To this the defendants rejoin, traversing the surrender of the lease of the 7th of April, 1812, and on this issue was joined. The second, third, and sixth issues, it will be observed, are mere traverses of the execution of deeds which are found by the special case to have been duly executed; and, as the traverse merely puts in issue the fact of the execution, and not the validity of the deeds or the competency of the parties to make them, the verdict on those issues must certainly

be entered for the plaintiff; and so must that on the fourth issue, whereby the defendant traverses the surrender by Osborn and Burt of the first term of ninety-nine years, when the demise of the second term was made to them. It is quite clear that the acceptance of the second demise was of itself a surrender in law of the first, even if no surrender in fact was made. For whom, then, is the verdict on the remaining issues, the first and fifth, to be entered? The issue on the fifth plea is, it will be observed, whether the lease of the 7th of April, 1812, was duly surrendered at the time of the making of the indenture of the 31st August, 1812. And the issue on the first plea is substantially the same; for if the plaintiff succeeds in showing that the indenture of the 7th April, 1812, was duly surrendered as set forth in his declaration, then it follows that the dean was at that time seised of the reversion, and so the plaintiff must succeed on the first issue; if, on the other hand, he fail on the fifth issue, he must also fail on the first.

The real question, therefore, for our consideration is, whether the plaintiff has succeeded in showing that the term of the 7th April was surrendered previously to the execution of the indenture of the 31st of August, 1812. On this subject it was argued by the counsel for the plaintiff, first, that the circumstances of the case warranted the conclusion that there was an actual surrender in fact; and if that be not so, then, secondly, that they prove conclusively a surrender in point of law.

We will consider each of these propositions separately. And first, as to a surrender in fact. The subject-matter of the lease of the 7th April, 1812, was, it must be observed, a reversion; a matter, therefore, lying in grant, and not in livery, and of which, therefore, there could be no valid surrender in fact otherwise than by deed; and what the plaintiff must make out, therefore, on this part of his case is, that, before the execution of the first lease for ninety-nine years, Ord and Planta, by some deed not now forthcoming, assigned or surrendered to the dean the interest which they had acquired under the lease of the 7th of April. But what is there to warrant us in holding that any such deed was ever executed? *Prima facie* a person setting up a deed in support of his title is bound to produce it. But undoubtedly this general obligation admits of many exceptions. Where there has been long enjoyment of any right, which could have had no lawful origin except by deed, then, in favor of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption. Has there, then, in this case, been any such enjoyment as may render it unnecessary to show the deed on which it has been founded? The only fact as to enjoyment stated in this case has precisely an opposite tendency; it is stated, so far as relates to the property, the rent of which forms the subject of this action, namely the houses, &c., underlet to Reed, that no rent has ever been paid; and therefore, as to that portion

of the property included in the lease of April, 1812, there has certainly been no enjoyment inconsistent with the hypothesis that that lease was not surrendered.

The circumstances on which the plaintiff mainly relies as establishing the fact of a surrender by deed, are the statements in the two leases to Osborn and Burt, that they were made in consideration, *inter alia*, of the surrender of the lease of the 7th April, and the fact of that lease being found among the dean's instruments of title. These circumstances, however, appear to us to be entitled to very little weight. The ordinary course pursued on the renewal of a lease is for the lessee to deliver up the old lease on receiving the new one, and the new lease usually states that it is made in consideration of the surrender of the old one. No surrender by deed is necessary, where, as is commonly the case, the former lessee takes the new lease, and all which is ordinarily done to warrant the statement of the surrender of the old lease as part of the consideration for granting the new one, is, that the old lease itself, *the parchment on which it is engrossed*, is delivered up. Such surrender affords strong evidence that the new lease has been accepted by the old tenant, and such acceptance undoubtedly operates as a surrender by operation of law, and so both parties get all which they require. We collect from the documents that this was the course pursued on occasion of making the lease of the 26th of December, 1803, and the lease of the 7th of April, 1812; and we see nothing whatever to warrant the conclusion that anything else was done on occasion of making the lease to Osborn and Burt.

Where a surrender by deed was understood by the parties to be necessary, as it was with reference to the term assigned to Barber and Parry, there it was regularly made, and the deed of surrender was indorsed on the lease itself. There is no reason for supposing that the same course would not have been pursued as to the lease of April, 1812, if the parties had considered it necessary. If any surrender had been made, no doubt the deed would have been found with the other muniments of title. No such deed of surrender is forthcoming, and we see nothing to justify us in presuming that any such deed ever existed. We may add, that the statement in the new lease, that the old one had been surrendered, cannot certainly of itself afford any evidence against the present defendants, who are altogether strangers to the deed in which those statements occur.

It remains to consider whether, although there may have been no surrender in fact, the circumstances of the case will warrant us in holding that there was a surrender by act and operation of law. On the part of the plaintiff it is contended, that there is sufficient to justify us in coming to such a conclusion, for it is said, the fact of the lease of the 7th of April, 1812, being found in the possession of the dean, even if it does not go the length of establishing a surrender by deed, yet furnishes very strong evidence to show, that

the new lease granted to Osborn and Burt was made with the consent of Ord and Planta, the lessees under the deed of the 7th of April, 1812. And this, it is contended, on the authority of *Thomas v. Cook*, 2 B. & Ald. 119, and *Walker v. Richardson*, 2 M. & W. 882, is sufficient to cause a surrender by operation of law.

In order to ascertain how far those two cases can be relied on as authorities, we must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor.

It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus, in the cases which we have adverted to of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties. These principles are all clearly deducible from the cases and doctrine laid down in Rolle, and collected in Viner's Abridgment, tit. "Surrender," F. and G. and in Comyns' Dig., tit. "Surrender," T. and I. 2, and the authorities there referred to. But, in

all these cases. it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner is not sufficient. Brooke, in his Abridgment, tit. "Surrender," pl. 48, questions the doctrine of Frowike, C. J., who says: "If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender," and says he believes it is not law; and the contrary was expressly decided in the case of *Swift v. Heath*, Carthew, 110, where it was held, that the consent of the tenant for life to the remainderman making a feoffment to a stranger, did not amount to a surrender of the estate for life, and to the same effect are the authorities in Viner's Abr., "Surrender," F. 3 and 4.

If we apply these principles to the case now before us, it will be seen that they do not at all warrant the conclusion, that there was a surrender of the lease of the 7th of April, 1812, by act and operation of law. Even adopting, as we do, the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question affords cogent evidence of their having consented to the making of the new lease, still there is no estoppel in such a case. It is an act which, like any other ordinary act *in pais*, is capable of being explained, and its effect must therefore depend, not on any legal consequence necessarily attaching on and arising out of the act itself, but on the intention of the parties. Before the Statute of Frauds, the tenant in possession of a corporeal hereditament might surrender his term by parol, and therefore the circumstance of his delivering up his lease to the lessor might afford strong evidence of a surrender in fact; but certainly could not, on the principles to be gathered from the authorities, amount to a surrender by operation of law, which does not depend on intention at all. On all these grounds, we are of opinion that there was in this case no surrender by operation of law, and we should have considered the case as quite clear, had it not been for some modern cases, to which we must now advert.

The first case, we believe, in which any intimation is given that there could be a surrender by act and operation of law by a demise from the reversioner to a stranger with the consent of the lessee, is that of *Stone v. Whiting*, 2 Stark. 236, in which Holroyd, J., intimates his opinion that there could; but there was no decision, and he reserved the point. This was followed soon afterwards by *Thomas v. Cook*, 2 Stark. 408; 2 B. & Ald. 119. That was an action of debt by a landlord against his tenant from year to year, under a parol demise. The defence was, that the defendant Cook, the tenant, had put another person (Parkes) in possession, and that Thomas, the plaintiff, had, with the assent of Cook, the defendant, accepted Parkes as his tenant, and that so the tenancy of Cook had been determined. The Court of King's Bench held, that the tenancy was determined by act and operation of law.

It is matter of great regret that a case involving a question of so much importance and nicety, should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested, which would have led the court to pause before they came to the decision at which they arrived. Mr. Justice Bayley, in his judgment says, the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit, an observation which forcibly shows the uncertainty which the doctrine is calculated to create.

The acts *in pais* which bind parties *by way of estoppel* are but few, and are pointed out by Lord Coke, Co. Lit. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery, entry, acceptance of an estate*, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed, if they are liable to be affected by such accidents as those alluded to by Mr. Justice Bayley. If the doctrine of *Thomas v. Cook* should be extended, it may very much affect titles to long terms of years, mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences.

The case of *Thomas v. Cook* has been followed by others, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision, that in such a case there was a surrender by act and operation of law, we should probably not have felt ourselves justified in overruling it. And, perhaps, the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles.

If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, and of which demises may therefore be made by parol, or writing, and where there is an open and notorious shifting of the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal heredita-

ments are disposed of, which pass only by deed. With respect to these, we think we ought to abide by the ancient rules of the common law, which have not been broken in upon by any modern decision; for that of *Walker v. Richardson*, 2 M. & W. 882, which has been much relied on in argument, is not to be considered as any authority in this respect, inasmuch as the distinction that the right to tolls lay in grant was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself. Moreover, according to the report of that case, it would seem that the new lessees had, before they accepted their lease, become entitled to the old lease by an actual assignment from the old lessee. If this were so, then there could, of course, be no doubt but that the old lease was destroyed by the grant and acceptance of the new one. It is, however, right to say, that we believe this statement to have crept into the report inadvertently, and that there was not, in fact, any such assignment. The result of our anxious consideration of this case is, that the verdict on the issues on the first plea and on the rejoinder to the replication to the fifth plea, must be entered for the defendants, and as those pleas go to the whole cause of action, the judgment must be for them.

In the case, as it was originally stated, it did not appear that there had been any change of dean since the original demise in 1803. We desired to have the case amended on this point, in order that the fact might appear, if the case should be turned into a special verdict. For during the incumbency of the dean, who made the lease for ninety-nine years, that lease would be good independently of the private Act, and as the immediate reversion, on which the defendant's lease depended, was assigned to the dean by Barber and Parry previously to the demise of the 29th of January, 1814, that reversion undoubtedly passed to Osborn and Burt, and would enable them, or the plaintiff claiming under them, to sue for the rent so long as the estate of the same dean continued, whether the lease for ninety-nine years was or was not warranted by the Act; and so the plaintiff might possibly have been entitled to judgment *non obstante veredicto*. It appears by the case as now amended, that the Bishop of Lincoln who was the dean granting the leases of ninety-nine years, ceased to be dean, and was succeeded by Dr. Van Mildert in October, 1820, before any part of the rent sought to be recovered in this action had accrued due, and therefore no question on this head arises.

Neither will the second private Act stated in the case aid the plaintiff. It appears that, in 1820, the difficulties in which the parties had involved themselves by neglecting to get a proper surrender of the lease of the 7th of April, 1812, was brought under the consideration of the Court of Chancery, in a suit there pending relative to the affairs of the Bowes family. Master Cox, by his report of the 15th of February, 1820, stated, that he was of opinion that both the leases of ninety-nine years were void, the first because

it was made when the original term of forty years was outstanding in Barber and Parry, and the latter, because at the time of its creation the lease of the 7th of April, 1812, was still outstanding, thus showing clearly his opinion, that nothing had happened to cause a surrender of that lease by operation of law; and he recommended that an Act of Parliament should be obtained to remedy the defect. His report was afterwards confirmed, and the second Act stated in the case was accordingly obtained. That Act received the royal assent on the 15th of July, 1820, and it was thereby enacted, that the lease of the 29th of January, 1814, should be valid to all intents and purposes; and further, that immediately after the passing of the Act, the leases of the 26th of December, 1803, the 7th of April, 1812, and the 31st of August, 1812, should be void to all intents and purposes. The effect of this was to destroy altogether the reversion in respect of which the rent now sought to be recovered was payable, and it may therefore well be doubted whether, even if all the issues had been found for the plaintiff, he could have had judgment. It is, however, sufficient for us to say that the Act certainly does not entitle the plaintiff to anything which he would not have been entitled to if no such Act had passed. More especially when it is considered, that, by the saving clause, the defendants are excepted out of the operation of the Act. The result therefore is, that the verdict on the first and fifth issues must be entered for the defendant, and on the other issues for the plaintiff, and the judgment will be for the defendant.

Judgment for the defendant.

CHAPTER VII

JOINT OWNERSHIP¹

BARTLET, PETITIONER *v.* HARLOW

12 Mass. 348. 1815.

THIS was a petition for partition of a certain tract of land situate in Plympton in the county of Plymouth, of a moiety of which the petitioner alleges himself to be seised in fee, as tenant in common with the respondent: who pleads that he is sole seised of the premises, and traverses the tenancy in common of the petitioner, on which issue is joined.

At the trial of this issue, which was had before the late *Judge Dewey* at the sittings here after the last October Term, it appeared that the petitioner claimed under an extent of an execution duly issued in his favor against one Levi Harlow, by virtue of which the officer delivered to him seisin and possession of one moiety of the land described in the petition, being all the right of the said Levi Harlow therein.— And it was agreed by the parties, that at the time of the said extent, the said Levi and the respondent were seised as tenants in common, by equal moieties, of a tract of land containing about sixty acres: and that the said extent was on a part only of said sixty acres, describing it by metes and bounds, and dividing it from the residue.

A verdict was taken by consent for the petitioner, subject to the opinion of the court, whether an extent, so made on the estate of one tenant in common, of a part only of the tract of land holden in common, was valid. If the court should be of opinion that such an extent was valid, the verdict was to stand, and further proceedings to be had upon it: but if the court should be of a different opinion, the verdict was to be set aside, and a verdict entered for the respondent.

JACKSON, J., delivered the opinion of the court.

By our Statute of Executions the creditor, if he thinks proper, may levy his execution on the real estate of his debtor, which shall be set off to him by metes and bounds; and if it is held in jointenancy, in coparcenary, or tenancy in common, the execution may be

¹ As grants and devises to two or more persons are now by Statute in most of the United States (see Stimson, Am. Stat. Law, § 1371), as well as in England, held, in general, to create tenancies in common it seems unnecessary to print cases on the question what words at common law created a tenancy in common. See Warren, Cas. on Prop., pp. 478-486.

extended on the "real estate held as aforesaid, or part thereof, describing the same with as much precision as the nature and situation thereof will admit."

It is contended by the counsel for the petitioner, that the officer and the appraisers, in pursuance of this Statute, may set off all the debtor's interest and estate in a part of the land held in common; and that, although a levy on a part of his interest in the whole land would be good, yet they are not confined to this mode.

On the other side it is contended, that the Statute speaks of levying in such a case on *part of the estate*, and not on *part of the land*; and that any construction, contrary to the plain import of the words, would be highly injurious to the other co-tenants. — To this it may be added, that in the following section of the same Statute, it is said that "when the real estate extended upon cannot be divided and set out by metes and bounds as before described, or by the description before mentioned, then execution shall be extended upon the rents of such real estate;" making a plain distinction between the two modes of levying before mentioned, and showing that the description contemplated in case of a jointenancy, &c. was not a description of the lands by metes and bounds.

This view of the language used by the Legislature would lead us to adopt the construction of the respondent's counsel: and we are confirmed in this opinion by a more general view of the object of the Statute, and of the consequences that would result from a different construction.

The levy of an execution upon real estate is a kind of Statute conveyance from the debtor to the creditor. "It shall make as good a title to the creditor, his heirs and assigns, as the debtor had therein." (Section 2.) It was not the intention of the Legislature to allow estates to be created or transferred in any new manner, altogether repugnant to the principles of the common law: but to put a conveyance under this Statute on as good a footing as if made freely by the debtor. And it is generally true, that no estate or interest in land can be transferred by such a levy, which the debtor might not have conveyed, by any suitable instrument, for a valuable consideration.

We are then to consider whether Levi Harlow, the debtor, could have conveyed by deed to the petitioner, by metes and bounds, twenty acres, parcel of the sixty acres which he held in common with the respondent, so as to entitle the petitioner, to maintain a writ or petition for partition of the twenty acres against the respondent.

There is very little concerning this question to be found in the books. Among the numerous examples in Co. Lit. and other books, of the severance of a jointenancy, we find many instances of a conveyance by one jointenant of a part of his estate, but not one unequivocal case of a conveyance of his estate in a part of the land. There is indeed one in Co. Lit. 193, which may possibly be so under-

stood. He says, "if two jointenants be of twenty acres, and one maketh a feoffment of his part in eighteen acres, the other cannot release" (viz. to his companion) "his entire part, but only in two acres; for that the jointure is severed for the residue." Lord Coke cites no case for this opinion; so that we have no opportunity to ascertain by a recurrence to the facts, whether he contemplated a conveyance of the co-tenant's part in eighteen specific acres by metes and bounds, or in eighteen twentieths of the land. If the latter be understood, it will perfectly well comport with the context; and will illustrate the general doctrine for which the case is introduced, as well as if it be intended of a specific portion of land. And it is observable that Lord Coke uses like words in another place, where it is plain that he intends an undivided portion of the estate, and not a specific parcel of the land. He says, if two jointenants, or tenants in common are disseised, and one releases all his right in the moiety, he shall be barred of his right in the whole; "but if he releases all his right which he has in the one acre, this shall bar him of his moiety of that acre only: and yet the moiety of two acres is one acre." Here it is obvious that, if in the latter case we understand one acre described by metes and bounds, there is no analogy between the two cases; and the expression at the close, that "the moiety of two acres is one acre," is wholly misplaced and without meaning. Nor could it ever have been supposed, that a release of his right in one specific part would bar him of his right in the other part.

There is one other case on this point, which is transcribed by Viner from Brownlow's Reports, 157. A manor was conveyed, one moiety to one man in fee, and the other moiety to twelve others in fee. The twelve made a feoffment to J. S. of twelve several tenements and land: and J. S. made twelve several feoffments to those twelve. The thirteenth man, who had the other moiety, brought one writ of partition against them all, pretending that they held *insimul et pro indiviso*; and by the opinion of the whole court it would not lie: but he ought to have brought several writs. Brownlow in the place cited is stating several different points relative to the writ of partition, apparently taken from different cases which he had heard or read. He mentions no name nor date of the case in question, nor any other particulars, from which we might learn whether there was anything peculiar in the circumstances, or whether the point now in question was considered by the court. A single case thus loosely reported, is entitled to very little consideration, when it appears to be in any degree inconsistent with the general principles of the law applicable to the subject.

On the other hand, it has been decided by this court, in the case of *Porter v. Hill*, 9 Mass. Rep. 34, that one jointenant cannot convey any specific part of the land to a stranger: at least not so as to prejudice his co-tenant. It is indeed intimated in that case, that

such a conveyance may operate by way of estoppel against the grantor. But this would not aid the petitioner in the present state of the case now under consideration.

In 2 Co. 68, and Cro. Eliz. 803, it is laid down, as a general principle, that one jointenant cannot prejudice his companion, in estate, or as to any matter of inheritance or freehold: although as to the profits of the freehold, as the receipt of rent, &c., the acts of one may prejudice the other. — But it would in many cases tend to the prejudice, and even to the destruction, of the interest of one co-tenant, if the other might convey to a stranger his moiety in several distinct parcels of the land. The owner of a moiety of a farm thus circumstanced, instead of one piece of land conveniently situated for cultivation, would on a partition be compelled to take perhaps ten or twenty different parcels interspersed over the whole tract, and separated by the parts allotted to the several grantees. Suppose that two men hold jointly, or in common, land in a town sufficient only for two house lots, and that one of them could convey to ten persons his share in as many different portions of the land; or that so many executions could be thus levied on his share: the other original co-tenant would, on a partition, be compelled to take ten different lots or parcels not adjoining to each other, and each too small for any useful purpose, instead of one houselot, to which he was originally entitled, as against the grantor.

If it be said that this is a necessary incident to his estate, which he must be supposed to have contemplated when he took it; it may be more justly said in answer, that the restraint contended for, by which one is prevented from conveying distinct portions of the land, is a necessary incident to the estate; and that as each was originally entitled to one moiety, for quantity and quality, to be assigned to him by commissioners or by a jury in due course of law, neither of them shall by his own act, control the commissioners or jurors, and prevent their assigning to his companion such portion, and in such manner, as they, in the exercise of a sound discretion, would have thought just and proper. As the co-tenant had not originally any such right or authority in himself, to control the proceedings on a partition: so neither can he transfer such a right to any assignees or grantees of his share.

It may be added, that if one co-tenant has this right, the others of course have the same. Suppose then that three or more persons hold in common a township of wild land, and that each of them, without regard to the others, should divide the whole into such lots as he thought proper, and sell his share in each lot to different purchasers. As the lines of the lots, thus arbitrarily designated by the different owners, would perhaps in no instance coincide, it is easy to see that a partition among the several grantees would become extremely difficult and inconvenient: and if we imagine a like case, with a greater number of original owners, and consequently a greater

diversity in the boundaries of the lots so conveyed, a partition would become perhaps utterly impossible.

Whilst the right of one co-tenant to aliene any distinct portion of the land might, as we have seen, be extremely injurious to his companion, the restraint on such alienations can seldom, if ever, prejudice the grantor. Suppose one of two co-tenants of forty acres wishes to sell ten acres, he may convey one undivided fourth part of the whole, and his grantee may by legal process have his share set off to him. This process of partition would be equally necessary, if the conveyance had been of a moiety of twenty acres taken out of the forty. There is therefore no additional trouble or expense: and the only difference is, that the grantor is prevented from selecting any particular portion of the whole tract, out of which his grantee shall take his share: which is a right he could never claim or exercise in his own behalf, while he continued the owner of the whole moiety.

We are therefore satisfied that the petitioner cannot have partition, as prayed for in this case.

It does not however follow that the levy of his execution is wholly void and fruitless. If the respondent should ever have his moiety duly set off to him in severalty, and if the part so assigned to him should not include that which was taken on the execution of the petitioner, we see no reason why the latter may not then hold what has thus been taken on his execution, as there will be no person interested or authorized to question his title, excepting Levi Harlow; who would probably be estopped by the levy of the execution, as he would be by any other conveyance made by himself.¹ Neither does it follow that the petitioner is not now entitled to a just proportion of the rents and profits of the lands, if they can be taken in such a manner as not to infringe the right of the respondent to his share, nor to disturb him in the enjoyment of an undivided moiety of the whole land. But as these points are not before us, it is unnecessary further to consider them.

The verdict returned in this case is to be set aside, and a verdict entered for the respondent, upon which judgment is to be rendered.²

STARR v. LEAVITT

2 Conn. 243. 1817.

THIS was an action of ejectment, to recover an undivided part of two pieces of land, bearing such proportion to the whole as 597.01 bears to 5069.94.

¹ See *Varnum v. Abbott*, 12 Mass. 474.

² And see *Cressey v. Cressey*, 215 Mass. 65.

The case was as follows. The plaintiff claimed title by virtue of an execution in his favor, against Simeon Mitchell, on which the premises were set off. The first piece lay partly in Roxbury, and partly in Washington; and the second wholly in Washington. They were owned in equal undivided moieties, by the debtor and his brother David Mitchell, during the life-time of the latter, as tenants in common, the titles by which they were being held distinct. On the death of David, the debtor became entitled, as heir-at-law, to one seventh part of David's interest, in addition to the moiety which he before owned. The debtor's interest in the second piece, however, was subject to the widow Susannah Mitchell's right of dower. The execution and cost amounted to 597 dollars, 1 cent. The land in Washington was appraised, by one set of appraisers, at 3452 dollars, 94 cents; that in Roxbury, subject to the encumbrance of dower, by another set of appraisers, at 1617 dollars; making in the whole 5069 dollars, 94 cents, the undivided half being 2534 dollars, 97 cents. The officer set off the land as follows: "I do, therefore, set off an undivided proportion and interest of the debtor in the above described land and buildings, in the proportion that 597 dollars, 1 cent, is to the aforesaid sum of 2534 dollars, 97 cents; and in the whole of said land before described, in the proportion that 597 dollars, 1 cent, is to the said sum of 5069 dollars, 94 cents; and the same is set off, subject to the aforesaid encumbrance of said widow's dower, to the creditor in said execution, in full satisfaction thereof, and of my fees thereon."

The defendant claimed title, by virtue of two executions against the same Simeon Mitchell, issued and levied *before* that of the plaintiff. One execution, with the cost, amounted to 138 dollars, 21 cents; which the officer levied on "the one equal half" of the second piece above mentioned. The certificate of the appraisers was as follows: "We, the subscribers, did appraise the above described undivided land to be worth to the creditor the sum of 138 dollars, 21 cents, in full satisfaction of this execution and costs." The land was set off, by the officer, thus: "I do hereby give the within named Samuel Leavitt, creditor, all the right and title to the above described undivided land, that I by law have a right to give, for his own proper use and benefit." The other execution, amounting, with the cost, to 435 dollars, 88 cents, was levied upon "the equal half of a piece of land lying in Washington, as the property of the execution debtor, and containing 12 acres and 79 rods, lying in common and undivided with the heirs of David Mitchell, deceased;" being part of the second piece before mentioned, designated by metes and bounds, and appraised at the amount of the execution and cost. This land was set off in the same form as the other piece.

This case was reserved, by agreement of parties, for the consideration and advice of the nine judges.

SWIFT, C. J. The plaintiff and defendant both claim the land

demand, by the levy of executions upon it, as the estate of Simeon Mitchell; and questions arise respecting their validity.

The defendant has levied upon part of a piece of land, which Simeon owned as tenant in common with the heirs of David Mitchell; the same has been set off to him by metes and bounds; and he has taken the undivided moiety or right of Simeon to the part of the tract so described. This levy is void, according to the principles adopted by this court, in the case of *Hinman v. Leavenworth*, 2 Conn. 244 n.¹ Simeon had no such estate as an undivided moiety or share in a part of the tract he owned as tenant in common: he had an undivided share in the whole tract; and the proper mode of levying the execution would have been, to spread it over the whole tract holden by Simeon as tenant in common, and to take such an undivided proportion, as would satisfy his debt. If the debt had been sufficient to take the whole share of Simeon, then the levying creditor would have been tenant in common with his co-tenant: if not, then he would have been tenant in common with the others in unequal shares, and a partition of the whole would have been made. But upon the present levy, partition must be made of part of the common right of Simeon with the other tenants; which cannot by law be done.

The plaintiff adopted the proper mode of levying his execution, but he has spread it over two distinct tracts of land holden by Simeon, as tenant in common with the heirs of David, by distinct titles, and has taken an undivided share of Simeon, in both pieces; but has not taken the whole of Simeon's right in either piece. He should have taken the whole of Simeon's right, in the tract on which he first levied, and then, if that had been insufficient to satisfy his execution, he might have levied on the other tract, and have taken sufficient to pay his debt. If the mode adopted by the plaintiff should be sanctioned, it would be in the power of a creditor to levy an execution upon any number of separate tracts of land, holden by a debtor as tenant in common, by distinct titles, and with different co-tenants, and take an undivided share of each, so as to become tenant in common with them all. This would be productive of great and unnecessary expense, and might embarrass the title as well as the occupation of the lands, and ought not to be permitted.

I am of opinion that the plaintiff is not entitled to recover.

¹ But see *Highland Park Co. v. Steele*, 235 F. R. 465; *East Shore Co. v. Richmond Ry.*, 172 Cal. 174; *Hartford Ore Co. v. Miller*, 41 Conn. 112, 131; *Pastine v. Altman*, 93 Conn. 707, 713; *Lane v. Malcolm*, 141 Ga. 424; *Finley v. Dubach*, 105 Kan. 664, 666; *Pellow v. Arctic Iron Co.*, 164 Mich. 87; *Warner v. Eaton*, 78 N. H. 15; *Kennedy v. Boykin*, 35 S. C. 61; *Hitt v. Caney Coal Co.*, 124 Tenn. 334, 351; 47 L. R. A. N. S. 573 note.

Compare *New Haven v. Hotchkiss*, 77 Conn. 168; *Gulf Refining Co. v. Carroll*, 145 La. 299; *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; *Lee v. Follensby*, 83 Vt. 35.

In this opinion the other judges severally concurred, except EDMOND and GOULD, JJ., who gave no opinion, the former being related to one of the parties, and the latter having been of counsel in the cause.

*Judgment to be given for the defendant.*¹

¹ *Butler v. Roys*, 25 Mich. 53, accord. *Contra, Thompson v. Barber*, 12 N. H. 563. Compare *Peabody v. Minot*, 24 Pick. (Mass.) 329; *Green v. Arnold*, 11 R. I. 364.

NOTE.—ACTIONS BY JOINT OWNERS AGAINST THIRD PERSONS. “*In real actions.* (1) Joint-tenants and coparceners must join. Lit. §§ 311, 313. (2) Tenants in common must sever, Lit. § 311; unless they seek to recover something undivisible in its nature. Lit. § 314.

“*In ejectment.* This action was based on a fictitious demise. If the demise was feigned to have been made by joint-tenants or coparceners jointly, the ejectment must be brought on the feigned demise; but if one of them is feigned to have demised his share separately, ejectment can be brought on the separate demise. *Roe v. Lonsdale*, 12 East, 39 (1810). On the other hand, any seemingly joint demise by tenants in common is really a demise of their separate estates, and therefore one ejectment cannot be brought on such demise as joint. *Mantle v. Wollington*, Cro. Jac. 166 (1607). *White v. Pickering*, 12 S. & R. 435 (1816). *Contra, Jackson v. Bradt*, 2 Caines’ Rep. 169 (1804); *Den d. Bronson v. Paynter*, 4 Dev. & B. 393 (1839).

“*In personal actions* all must join, because the injury is to the possession. Lit. § 315. [*Sligo Furnace Co. v. Dalton*, 255 F. R. 532.]

“It may be observed that in an action for nuisance all the owners of the land on which the nuisance is alleged to exist must be joined as defendants. 1 Wms. Saund. 291 g.

“In many of the United States, joint-tenants, coparceners, and tenants in common are now allowed by Statute to join or sever at their pleasure.

“When one tenant in common in possession has been ejected by a stranger to the title, such tenant can recover the possession counting on his own seisin, and a disturbance of it; but when he has not been in possession, or otherwise counts on his title to an undivided share, he can recover against a stranger only that share. *Jackson v. Van Bergen*, 1 Johns, Cas. 101 (1799). *Dewey v. Brown*, 2 Pick. 387 (1824). *Dawson v. Mills*, 32 Pa. 302 (1858). *Gray v. Givens*, 26 Mo. 291 (1858). But see *Baber v. Henderson*, 156 Mo. 566 (1900). [*Moppin v. Norton*, 40 Okla. 284.]

“It has, however, been held in some States that one tenant in common can recover possession of the whole property as against a stranger. *Barrett v. French*, 1 Conn. 354 (1815). *Phillips v. Medbury*, 7 Conn. 568 (1829). *Robinson v. Johnson*, 36 Vt. 69 (1863). *Lampsen v. Brander*, 28 Minn. 526 (1881). See Freem. Co-ten. §§ 343, 344. [*Hooper v. Bankhead*, 171 Ala. 626; *Chandler v. Pope*, 87 So. (Ala.) 626; 11 Col. L. Rev. 579.]

“When all joint owners must join in an action, it is generally conceded that they must all be competent in order to recover. (But see *Henry v. Means*, 2 Hill, S. C. 328 (1834). The inference usually drawn from this doctrine is that if the Statute of Limitations has run against one of the plaintiffs, the suit is barred. This follows *Perry v. Jackson*, 4 T. R. 516 (1792). See *Marsteller v. M’Clean*, 7 Cranch, 156 (1812). But sometimes the opposite conclusion is drawn; viz., that if one of the plaintiffs is not barred, none of them are. *Lahiffe v. Smart*, 1 Bail. 192 (1829). See *Sanford v. Button*, 4 Day, 310 (1810); *Meese v. Keeffe*, 10 Ohio, 362 (1841). Cf. *Shute v. Wade*, 5 Yerg. 1 (1833). [*DeVaughn v. McLeroy*, 82 Ga. 687, 713; *Ferguson v. Prince*, 136 Tenn. 543, 559.]

“But where, under State Statutes, joint owners who need not join in fact do so, if one is barred, all are barred, even in those jurisdictions where,

PAGE v. WEBSTER AND ANOTHER

8 Mich. 263. 1860.

QUESTIONS reserved from Montcalm Circuit in Chancery, where Canso Crane, one of the defendants, had interposed a demurrer to the bill of complaint, for multifariousness. The case is sufficiently stated in the opinion.

MARTIN, C. J. This bill is filed for partition of real estate held by the complainants and defendants as tenants in common. As to Webster, who is described as being the owner of an undivided one-fourth, the bill is taken as confessed. Crane is represented as the owner of another undivided one-fourth, and the bill further alleges that he has a pretended title which he claims to hold as adverse to that of his co-tenants, but which is averred to be fraudulent and void; and they ask to have it so declared, in order that partition of the several interests of the owners may be made. The facts respecting this title are set out in the bill substantially as follows: The whole of the lands owned in common was sold at tax sales, for non-payment of taxes assessed thereon during the continuance of the tenancy in common; and upon such sales, the defendant Crane, being such co-tenant, bid off the same for the taxes of certain years, and for those of other years caused the land to be bid off by his brother, but for his own use, and, as the bill alleges, he took a transfer of the bids, and procured deeds from the Auditor-General to be executed therefor to himself. Reed, in his lifetime, offered to pay Crane his proportion of such bids, and the interest, &c., and the complainants, who are his executor and devisees, are still ready and now offer to do so; but they also insist that such sales were invalid for irregularities, and that Crane's title is a cloud upon theirs which ought to be removed.

This, Crane contends, is an assertion and admission of an adverse title and claim in himself, which cannot be litigated in this suit; but that the validity of his title thus acquired should be first determined at law, and if found to be invalid, then this suit can be maintained.

It is unnecessary to determine whether, on a bill for partition between tenants in common, adverse titles or claims can be litigated and settled; because, if the allegations of this bill are true — and the demurrer admits their truth — Crane has no adverse title or claim. He occupies neither the position of one purchasing in an outstanding

if the joining is compulsory, none are barred. *Sanford v. Button, ubi sup. Moore v. Armstrong*, 10 Ohio, 11 (1840). *Freem. Co-ten. §§ 375-378.*" 6 Gray, *Cas. on Prop.*, 2d ed., pp. 508, 509. [The citations in brackets are inserted by the editor.]

adverse title,¹ nor of one purchasing from a *bona fide* purchaser at a tax sale, whose title had become absolute, whereby the co-tenancy had been dissolved.² He stands simply as one who has paid upon compulsion taxes assessed against the property held by him in common with others.

The burden was cast upon him and his co-tenants to pay the taxes assessed against the land. This each might have discharged, so far as his own interest was concerned, by paying his aliquot proportion of the tax; and thus relieved such interest from the lien for the tax which the law imposed upon it. Had Crane done this, and afterwards bid in his co-tenants' interest sold for their default, perhaps a different rule might obtain, and he have acquired a good title as against them: but such is not this case, and no opinion is called for upon such a state of facts. But as they all neglected to discharge

¹ "In some cases, says Littleton (sect. 307), a release to one joint tenant shall aid the joint tenant to whom it was not made, as well as him to whom it was made. I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim, to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners in which case all are entitled to the common benefit, on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding encumbrance, or an adverse title, to disseise and expel his co-tenant. It cannot be tolerated, when applied to a common subject, in which the parties had equal concern, and which a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest." — *Per* Chancellor KENT in *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388, 407-408.

And see *Rothwell v. Dewees*, 2 Black (U. S.) 613, 618; *Cornett v. Burchfield*, 142 Ky. 357; *Coburn v. Page*, 105 Me. 458; *Watson v. Vinson*, 108 Miss. 600, 611; *Davis v. Givins*, 71 Mo. 94; *Gearheart v. Gearheart*, 213 S. W. (Mo.) 31; 24 Yale L. J. 316; 6 A. L. R. 297.

Compare *Starkweather v. Jenner*, 216 U. S. 524; *McNutt v. Nuevo Land Co.*, 167 Cal. 459; *Scanlon v. Parish*, 85 Conn. 379; *Bartea v. Merriam*, 52 Minn. 222; *Becker v. Becker*, 254 Mo. 668; *Wenzell v. O'Neal*, 222 S. W. (Mo.) 392; *Jackson v. Baird*, 148 N. C. 29; *McLawhorn v. Harris*, 156 N. C. 107; *Troxler v. Gant*, 173 N. C. 422; *Hogan v. Utter*, 175 N. C. 332; *Webster v. Rogers*, 87 Oreg. 547, 557; *Davis v. Solari*, 132 Tenn. 225; *Roberts v. Thorn*, 25 Tex. 728; *Cedar Canyon Co. v. Yarwood*, 27 Wash. 271; *Kennedy v. De Trafford*, [1897] A. C. 180.

² See *Dubois v. Campau*, 24 Mich. 360, 370.

this burden, and as the coercive measure of a sale of the land was resorted to by the State to compel it, when Crane bid in, or procured another to bid in the land for him, and took the deeds to himself, he acquired thereby no title as against his co-tenants, as this was but another way of discharging such burden. He was in default himself; and his default, as well as that of the other co-tenants, occasioned the sale; and he cannot be permitted to take advantage of his own neglect of duty, to acquire the title of others. So far as this suit is concerned, therefore, he stands in the precise situation in which he would, had he voluntarily paid the whole amount of taxes before sale. He has no title, but simply a right to compel contribution from his co-tenants; and the bill is not multifarious for averring the facts, the character of the purchase, and his adverse claims founded upon it; nor for praying relief against them in aid of the partition. See *Lewis v. Robinson*, 10 Watts, 354; *Williams v. Gray*, 3 Greenl. 207; *Van Horne v. Fonda*, 5 Johns. Ch. 407.

Such being the rule, both of law and equity, complainants are entitled to the discovery sought; for if Crane's title be of the character charged in the bill, the court may and ought to declare it void and no impediment in the way of making partition between these parties. See *Overton v. Woolfolk*, 6 Dana, 374.

The interests of the several complainants are set forth with sufficient particularity. The Statute (Comp. L. § 4619) requires that the bill shall set forth the rights and titles of all persons interested in the land, so far as the same are known to the complainant. These complainants proceed jointly as the executor and devisees of Hezekiah H. Reed, for a partition between the estate and these defendants. They ask no partition as between themselves. So far as the executor is concerned, he represents the whole title, and the devisees unite with him as interested in the subject-matter, and submitting to be bound by the decree. This they may do, as indeed may all representatives of a single interest. See Hill. on Real Property, 606.

The objection of the defendant Crane appears to be, that the interest of each complainant is not set out with sufficient particularity, and that the bill does not show in what proportions the complainants take under the will of Reed, nor in what manner Page has an interest in the land, nor how much that interest is. The bill avers that Hezekiah H. Reed, in his lifetime, was seised of the undivided one-half of the lands in question, and while so seised, died, leaving his last will and testament, whereby, among other things, Page was nominated his executor, and the land was devised in common to the other complainants, with the power nevertheless in such executor to sell and dispose of the same. There is no ambiguity in this statement of the interests of the several complainants, which, with the exception of that of Page, would necessarily be share and share alike; and Page's interest is stated with sufficient clearness as that of an executor with power to sell and dispose of

the whole interest which the testator had in the land. I can perceive no necessity in any case for greater particularity; nor are we referred to any authorities or any principle of pleading requiring it. Sufficient is stated to enable the court to take the necessary proofs of the interests of the several parties, upon which to decree a partition; and especially in this case, where the complainants seek no partition as between themselves.

Let it be certified to the Circuit Court for the county of Montcalm, as the opinion of this court, that, upon the points reserved, the demurrer should be overruled.

The other justices concurred.¹

KIRKPATRICK v. MATHIOT

4 W. & S. (Pa.) 251. 1842.

ERROR to the Common Pleas of Westmoreland County.

David Kirkpatrick against Jacob D. Mathiot and Noah Mendall. This was an action of ejectment for the undivided fourth part of a tract of land: in which the parties stated the following facts, and considered them in the nature of a special verdict.

Previous to the 8th of January, 1801, John Probst was the owner of a full equal and undivided fourth part (the whole in four equal parts to be divided) of a certain furnace, called the Westmoreland furnace and forge, and of several tracts of land connected with the same, amounting altogether to 2998 acres, more or less, which undivided fourth part the plaintiff claimed title to recover in this action. On the 8th of January, 1801, John Probst executed a mortgage for the Westmoreland furnace property, including the lands in controversy, to John Kirkpatrick, to secure the payment of £1050. John Kirkpatrick sued out a *scire facias* upon the mortgage to March Term, 1807, of the Common Pleas of Westmoreland County, against the administrators of John Probst, deceased, the mortgagor, upon which judgment was rendered for the plaintiff, on the 26th of November, 1820, for the sum of \$5744, with costs of suit. Where-

¹ And see *Sanders v. Sanders*, 145 Ark. 188; *Watson v. Williams*, 175 Pac. (Kan.) 96; *McGrath v. Smith*, 175 Ky. 572; *Gulf Refining Co. v. Jeems Club*, 129 La. 1021; *Hurley v. Hurley*, 148 Mass. 444; *Trumbull v. Bruce*, 64 Wash. 644; *James v. James*, 77 W. Va. 229; *Jarrett v. Osborne* 84 W. Va. 559; 8 Am. & Eng. Ann. Cas. 988.

Compare *Bracken v. Cooper*, 80 Ill. 221; *Montague v. Selb*, 106 Ill. 49; *Biggins v. Dufficy*, 262 Ill. 26; *Conn v. Conn*, 58 Iowa 747; *Curry v. Lake Superior Iron Co.*, 190 Mich. 445.

Failure of co-tenants to contribute their proportion of the price paid. *Wilson v. Linder*, 21 Idaho 576, 584; *Kent v. Barger*, 264 Ill. 59; *Spurlock v. Spurlock*, 161 Ky. 248; *Dickerson v. Weeks*, 106 Miss. 804; *Dwight v. Waldron*, 96 Wash. 156. Compare *Abbott v. Williams*, 74 W. Va. 652.

upon *levari facias*, No. 111, of February Term, 1821, was issued, in virtue of which the mortgaged premises were struck down to David Kirkpatrick, the plaintiff of record in this action, on the 19th of February, 1821.

John Klingensmith, Esq., was sheriff of the county of Westmoreland at the time of the levy and sale, and the return was signed by him, having been commissioned on the 19th of November, 1819. John Klingensmith was commissioned as sheriff of Westmoreland County, a second time, on the 28th of October, 1828. On the 27th of August, 1829, John Klingensmith, sheriff, in pursuance of the proceedings heretofore referred to, executed a deed to the purchaser, David Kirkpatrick, for the land in controversy, and acknowledged it in open court on the 13th of August, 1830. No application for leave for the sheriff to execute the deed, nor any order of court relative thereto, could be found on record, and no such order existed, unless it could be inferred from the fact of the acknowledgment, which was regularly entered on the minutes of the court on the day it purported to have been taken. The above statement formed the plaintiff's claim of title.

Some time previous to the 3d of January, 1825, Alexander Johnson became vested with the title to one equal half part of one equal fourth part (the whole in four equal parts to be divided) of the Westmoreland furnace and forge, with the appurtenances, including the several tracts of land, supposed to embrace 2998 acres, more or less, being the same land of which the plaintiff claimed title to the undivided fourth part, for which this ejectment was brought; and on the 3d of January, 1825, Alexander Johnson conveyed the same to James Cuddy. On the 26th of December, 1825, James Cuddy sold to Jacob D. Mathiot and Noah Mendall, the defendants, all the interest he had in the property in controversy, in virtue of the deed from Alexander Johnson, together with the half of an undivided fourth part of the same property as held by James Cuddy, under an article of agreement entered into between himself and M'Clurg & M'Knight, bearing date the 15th of June, 1825. Under this contract the defendants became entitled to an undivided fourth part (in four equal parts to be divided) of the property for which this action was brought.

The tract of land in controversy was purchased by the commissioners of Westmoreland County at a treasurer's sale of unseated land, on the 25th of June, 1822, for taxes assessed on the land as unseated, from the year 1808 up to the time of sale; and a deed was duly executed to them, pursuant to the Act of Assembly, by the county treasurer, on the 14th of February, 1823. Five years having elapsed without the property having been redeemed by the owners, the commissioners of Westmoreland County proceeded to sell the same pursuant to the Acts of Assembly in such case made and provided; and on the 25th of November, 1829, the property in

controversy was struck down to Jacob D. Mathiot and Noah Mendall, the defendants, for the consideration of \$30, and a deed duly executed and acknowledged by them to the purchasers. Before the commencement of this action, the plaintiff tendered to the defendants the proportion of the amount of the purchase money, the consideration of the commissioners' deed, which would be equivalent to the share to which he claimed title.

If, under this statement, the court should be of opinion that the plaintiff was entitled to recover, judgment was to be entered for him, with six cents damages and six cents costs; if otherwise, judgment to be entered for defendants.

The court below (*White, President*) rendered a judgment for defendants.

The opinion of the court was delivered by

HUSTON, J. The decision of this case will depend on the construction of the following sections of the Act of 13th of March, 1815, and on the relations and duties of tenants in common to each other. The fifth section of the Act provides that if a sum shall not be bid for a tract of land offered at treasurer's sale, sufficient to cover the taxes and costs accrued at that time, "it shall be the duty of the commissioners of the proper county, or any of them, to bid off the same, and a deed shall thereupon be made by the treasurer to the commissioners for the time being, and to their successors in office, to and for the use of the proper county; and it shall be the duty of the commissioners to provide a book, wherein shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land, and the amount of taxes it was sold for; and every such tract shall not thereafter, so long as the same shall remain the property of the county, be charged in the duplicate of the proper collector; but for five years next following such sale, if it shall so long be unredeemed, the commissioners shall, in separate columns in the same book, charge every such tract of land with the reasonable county and road tax, according to the quality of said land, not exceeding in any case the sum of \$6 for every hundred acres." By a subsequent Act of 13th of March, 1817, it was left discretionary with the commissioners whether they would purchase.

"Sect. VI. The right of redemption shall remain in the real owner for five years after such sale, on paying the treasurer of the county all the taxes and costs due thereon at the time of the sale, and interest therefor; and also the taxes assessed and interest thereon from the time it ought to have been paid, and on the production of the treasurer's receipt the commissioners shall, by deed poll indorsed on the back of the deed of the treasurer to them, convey to the person who shall have been the owner of the land at the time of the sale, or to his legal representatives, all the right and title which the county may have acquired under such sale as aforesaid;" the road tax to be paid to the supervisors of the proper township.

"Sect. VII. If the owner of such land shall not redeem the same within the period aforesaid, it shall thereafter be lawful for the commissioners to sell any such land by public sale, and make a deed therefor to the purchaser, which shall be available in law against the county as well as against the person or persons as whose estate the same had been sold; but no tract shall be sold for a sum less than the amount of taxes, cost, and interest which shall be due at the time of such sale by the commissioners," &c. And by Act of 20th of March, 1824, section second, it is enacted, that such deed made by the commissioners shall vest a good and valid title in fee-simple in the purchaser. And by the first section it is enacted, that the commissioners may sell lands so purchased for the best price that can be obtained for them. There is nothing in any of these Acts which in any degree gives color to the idea that after the five years have expired the former owner had any particle of interest in them, or in the proceeds of them.

Two cases decided in this court seem to settle all matters necessary to decide this cause. *Huston v. Foster*, 1 Watts, 477. The offer of the former owner to redeem after the five years had elapsed, did not avail him anything; and secondly, the sale by the commissioners after the five years was a sale by owners, and the purchaser was not bound to show anything but his deed. The other case is *Lewis v. Robinson*, 10 Watts, 354. Land held by two joint tenants was sold for taxes; after the time for redemption had gone by, one of those who had been a tenant in common bought from the purchaser at sale for taxes. This court held that although if one tenant in common had redeemed the land within two years it might have enured to the use of the other; yet after the time for redemption had elapsed, and the title was valid in the purchaser, the relation of tenants in common ceased, and either might purchase and hold for himself. These decisions, or the last of them, were not published when this writ of error was taken. *Judgment affirmed.*¹

LIT. § 322. Also, in the case aforesaid, as if two have an estate in common for term of years, &c., the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety, &c.

LIT. § 323. In the same manner it is where two hold the wardship of lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of *ejectment de gard* of the moiety, &c., because that these things

¹ And see *Bracely v. Noble*, 201 Ala. 74; *Alexander v. Sully*, 50 Iowa 182. Compare *Hanley v. Federal Mining Co.*, 235 F. R. 769; *Barksdale v. Learned*, 112 Miss. 861.

are chattels reals, and may be apportioned and severed, &c., but no action of trespass (*videlicet*) *Quare clausum suum fregit, et herbam suam, &c. conculcavit, et consumpsit, &c., et hujusmodi actiones, &c.*, the one cannot have against the other, for that each of them may enter and occupy in common, &c., *per my et per tout*, the lands and tenements which they hold in common. But if two be possessed of chattels personals in common by divers titles, as of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong to occupy in common, &c., when he can see his time, &c. In the same manner it is of chattels reals, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law, but to take the infant out of the possession of the other when he sees his time.

Co. Lit. 200 b. If two tenants in common or jointenants be of an house or mill, and it fall in decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione facienda*; and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur*: whereby it appeareth, that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men.

If one jointenant or tenant in common of land maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But although one tenant in common or jointenant without being made bailiff take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, bailiff, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailiff. And therefore all those books which affirm that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when the one maketh the other his bailiff, for otherwise never his bailiff to render an account is a good plea.

St. 4 & 5 ANNE, c. 16, § 27. And be it enacted by the authority aforesaid, That from and after the said first day of Trinity Term, actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common; and the auditors appointed by the court, where such actions shall be depending, shall be, and are hereby empowered

to administer an oath, and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be.¹

WAIT v. RICHARDSON AND OTHERS

33 Vt. 190. 1860.

TRESPASS QU. CL. FR. The facts in the case are sufficiently stated in the opinion of the court.

The county court, at the September Term, 1859. — POLAND, J., presiding, — held that the action could not be maintained, and rendered judgment for the defendants, to which the plaintiff excepted.

BARRETT, J. The declaration in this case was not furnished to the court, but it was treated in the argument as being in trespass *quare clausum*. The statement of agreed facts shows that, at the time of the alleged trespass, the parties held title to the *locus in quo* in undivided moieties, thus being tenants in common; that the plaintiff was in adverse possession, claiming the whole lot; that the defendant, Richardson, also claimed the whole lot under a deed from Sheafe, and that he, with the other defendants as his servants, entered upon said lot under his said claim, and cut and carried away the timber from all of said lot.

The only question discussed at the bar was, whether the plaintiff was entitled to maintain this form of action for said acts of the defendants.

In the case of *Booth v. Adams et al.*, 11 Vt. 156, it was held, in the language of the reported opinion, that "one tenant in common of land cannot maintain trespass against his co-tenant unless he is expelled from the common estate, or deprived of the common enjoyment."

That seems to have been an action of trespass *de bonis*. The decision of that case upon its facts, irrespective of the peculiar form of expression in which it was announced, would seem to be a conclusive authority against the plaintiff in the present case; for if trespass *de bonis* would not lie, a *fortiori*, trespass *quare clausum* would not.

It is undoubtedly true that the language of the decision above cited, and the remarks of the judge in the discussion of the subject, had exclusive reference to the action then under consideration, both in its form and substance; yet, as that language is general, and does

¹ See Stimson, Am. St. Law, § 1378.

not expressly restrict itself to that form of the action of trespass, the urgency, with which the learned counsel pressed upon the court the right of the plaintiff to maintain this action, has led us to suspect that they regard the language of that decision, and the remarks of the judge in drawing up the opinion as designed to indicate that the action of trespass *quare clausum* may be brought by one tenant in common against his co-tenant, as well as trespass *de bonis*. The cases cited by the plaintiff's counsel, to show that trespass or ejectment might lie in favor of a tenant in common against his co-tenant do not sustain that proposition.

Not one of them was trespass *quare clausum*, but all were ejectment or writ of entry. The language of Judge WILLIAMS in *Kirby v. Mayo*, 13 Vt. 103, is cited. He announced in general terms a very old and well established doctrine, that "the possession of a tenant in common, as well as that of a tenant at will, may become adverse, so that his co-tenant or the landlord may treat him as a trespasser, and maintain an action against him as such." And in consequence of such adverse possession by the defendant in that case, the court held that the plaintiff had lost his right in common to the property in question. We think it clear that the learned judge did not intend, by using the term *trespasser*, to convey the idea that the party might be pursued by a technical action of trespass; and that he did not so mean in saying that an action might be maintained against him as *such* trespasser. In our opinion, all that he meant was, that a tenant in common might be transcending his right as such tenant, by the character of the possession he was holding, and therein, in the generic and untechnical sense of the term, be trespassing upon the right of his co-tenant; as would be true in that case of an *ouster*. In such case the party whose right was thus trespassed upon, might maintain an action against his co-tenant, on account of such transcending of legal right. But we think it was not designed to indicate the form of action which would be proper, under the rules of the law, in such case.

We have taken occasion to examine all the cases cited, and also to look into some of the older, as well as some of the more modern books. In Coke Lit. sec. 322, it is said "if two have an estate in common for term of years, etc., and one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety," etc. Sec. 323, "in the same manner it is, when two hold the ownership of the lands or tenements during the non-age of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of ejectment *de garde*, etc., * * * but no action of trespass (*videlicet*) *quare clausum suum fregit*, etc., for that each of them may enter and occupy in common, etc., *per my et per tout*, the land and tenements which they hold in common." In *Haywood v. Davis*, Salk. 4, it was agreed that

in trespass the defendant cannot plead *in abatement* that he is tenant in common with the plaintiff, because he may give it in evidence, and that will prove him not guilty.

In Sel. N. P. 1347, it is said that one tenant in common cannot bring an action of trespass against his co-tenant, because each of them may enter and occupy, etc., *per my et per tout*, the lands and tenements which they hold in common. In *Cubitt v. Porter*, 8 B. & C. 257, LITTLEDALE, J., says, "If there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that trespass will lie, for in trespass the breaking and entering is the gist of the action; expulsion or ouster is mere aggravation of the trespass. If the original entry, therefore, be lawful, trespass will not lie." That was trespass *quare clausum* by one tenant in common against another for pulling down a partition wall that was property in common. In *Cutting v. Rockwood*, 2 Pick. 443, which was trespass *quare clausum*, WILDE, J., says "it is a sufficient justification for the defendant that he and those under whom he holds had an estate in common with the plaintiffs."

It was decided in *Goodtitle v. Toombs*, 3 Wils. 118, that after a recovery in ejectment by a tenant in common against his co-tenant, an action of trespass for the *mesne profits* would lie between the same parties. So far as I have examined, that seems to be the first case of the kind that the books show to have been maintained for *mesne profits*. It is regarded as an exception to the established rule, and seems designed, in connection with the modern action of ejectment in England, (in which the term only and nominal damages can be recovered,) to supply the place and office of the old ejectment at common law, in which *mesne profits* were recoverable by way of damage. In this action of trespass for *mesne profits*, the prior recovery in ejectment is conclusive in favor of the plaintiff of his right to recover such damage as he can show by having been kept out of the common property, including the *mesne profits*. It is obvious that this all proceeds upon a ground and gist of action very different from a trespass by *breaking and entering* the plaintiff's close. It seems to be adopted by the courts, as a kind of necessary complement to the modern *ejectment* in England, necessary in order to afford the plaintiff, recovering in ejectment, adequate means of remedy for the invasion of his rights, as established by the judgment in ejectment.

The mere entry upon the common land by one of the tenants, and cutting and carrying off the timber therefrom, is nowhere treated as giving to the other tenant the right to maintain an action of trespass of any kind, and least of all could it give the right to maintain trespass *qu. cl.* Superadd the fact which is shown in this case, that the plaintiff herself was all the while in possession of the property, claiming to hold it adversely to the defendant, in exclusive ownership, and the entire lack of ground for maintaining

this action, either upon principle or precedent, is very palpable. See 1 Swift's Dig. 514.

The manner in which the subject of trespass to real property is presented in Hammond's N. P. 151, (a book remarkable for philosophical and logical method in propounding and developing legal principles,) makes palpable the paradox involved in the idea of the right of a tenant in common to maintain trespass *qu. cl.* against his co-tenant. "In every case where one man has a right to exclude another from his real immovable property, the law encircles his estate if it be not already enclosed, with an imaginary fence, etc., * * * and entitles him to a compensation in damages for the injury he sustains by the act of another passing through the boundary, denominating the injurious act a breach of the enclosure." It is fundamental in the law of the subject that one tenant in common has no right to exclude the other from the common property. Hence any enclosure of it, whether by the imaginary fence that the law constructs, or by a real one constructed by the hands of men, defines no right in exclusion of, and constitutes no barrier against, either of the common tenants; and of course the passing through such boundary by either of them would be no breach of the enclosure, and could give no right of action in trespass *quare clausum fregit*.

It is needless to pursue the discussion further. As before remarked, the case cited from 11 Vt. *supra*, seems to us to be a conclusive authority against this action, as it stands upon the agreed statement of facts. With that decision upon the point then under judgment, we are well satisfied. *Judgment affirmed.*¹

¹ "The court, however, did err in submitting the case to the jury upon the theory of an ownership in common by the adjoining proprietors, not because the undisputed facts in the case show that the south half of the hedge fence was appurtenant to the west forty, but because appellee was not entitled to recover damages from appellants in an action of trespass *quare clausum fregit* for the destruction of the hedge fence if the hedge was owned in common by appellants and appellee. It is elementary that one tenant in common cannot be guilty of committing a trespass upon property which he owns in common with another."—*Per COOKE, J.*, in *Conklin v. Newman*, 278 Ill. 30, 35, 36. See *Buchanan v. Jencks*, 38 R. I. 443; *Martyn v. Knowllys*, 8 T. R. 145; 2 A. L. R. 993.

Contra, *Wilkinson v. Haygarth*, 12 Q. B. 837. See *Hennes v. Hebard*, 169 Mich. 670.

Compare *Lyon v. Bursey*, 42 App. D. C. 519; *Abbey v. Wheeler*, 170 N. Y. 122; *Carnes v. Dalton*, 56 Oreg. 596.

In many states there are statutes making a co-tenant liable to other co-tenants for waste. *Childs v. The Kansas City Ry. Co.*, 117 Mo. 414, 434; *Hardman v. Brown*, 77 W. Va. 478. 1 Stimson, Am. St. Law, § 1377.

HENDERSON, EXECUTOR v. EASON

17 Q. B. 701. 1851.

PARKE, B., now delivered the judgment of the court.¹

This case was heard before us at the sittings after last Trinity Term. It is an action of account founded on the Statute 4 Ann. c. 16, by Robert Eason against the executor of his co-tenant in common, Edward Eason. The declaration states: (His Lordship here stated the substance of the count). There is an averment that Eason in his lifetime received more than his just share and proportion of the rents, issues, and profits of the said tenancy, that is to say the whole of the rents, issues, and profits, and had not rendered an account to the plaintiff.

There were two pleas to the declaration: (His Lordship stated the pleas).

Issue being joined on these pleas, evidence was given that the two Easons were tenants in common in fee of a messuage and farm of above 133 acres of land from November, 1833, to November, 1838, during which time Edward Eason occupied the whole on his own account, the plaintiff occupying no part: that he cultivated the same on his own account solely, and appropriated the produce to his own use; and that he cropped the farm in the usual way, kept the usual quantity of live and dead stock, and farmed well; and that he received all the produce of the farm, and sold it on his own account.

On the trial, before our Brother *Coleridge*, the plaintiff's counsel insisted that this evidence was conclusive on the first issue, and presumptive evidence on the last, in favor of the plaintiff: and so the learned judge held, in compliance with the ruling of the Court of Queen's Bench on a special case between the same parties, reported in 12 Queen's Bench Reports, 986.

That case was stated by leave of a judge, in an action brought by order of the late Lord Chancellor. The Lord Chancellor, we are told, was dissatisfied with that proceeding for certain reasons wholly immaterial to be inquired into by us, and directed this action to be brought, in which the important question between the parties is to be settled.

There is no doubt as to the law before the Statute of 4 Ann, c. 16. if one tenant in common occupied, and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate.

¹ The statement of facts is omitted.

Until the Statute of Anne this state of the law continued. That Statute provides, by section 27, that an action of account may be brought and maintained by one joint tenant and tenant in common, his executors and administrators, against the other, for *receiving* more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common; and the auditors are authorized to administer an oath.

Declarations framed on this Statute vary from those at common law, as it is an essential averment in them that the defendant has *received* more than his share. This was held in the case of *Wheeler v. Horne*, Willes, 208, and in *Sturton v. Richardson*, 13 M. & W. 17.

Under the Statute of Anne he is bailiff only by virtue of his receiving more than his just share, and as soon as he does so, and is answerable only for so much as he actually receives, as is fully explained by Lord Chief Justice Willes in the case above cited. He is not responsible, as a bailiff at common law, for what he might have made without his wilful default.

It is to be observed that the Statute does not mention lands or tenements, or any particular subject. Every case in which a tenant in common *receives* more than his share is within the Statute; and account will lie when he does *receive*, but not otherwise. It is to be observed, also, that the receipt of *issues and profits* is not mentioned but simply the receipt of more than comes to his just share; and, further, he is to account when he *receives*, not *takes*, more than comes to his just share. What, then, is a "*receiving*" of more than comes to his just share, within the meaning of that provision in the Statute of Anne?

It appears to us that construing the Act according to the ordinary meaning of the words, this provision of the Statute was meant to apply only to cases where the tenant in common received money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion.

The Statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent-charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy.¹ There is no difficulty in ascertaining the share of each,

¹ See *Johnson v. Johnson*, 38 N. D. 138; 29 L. R. A. N. S. 229 note; L. R. A. 1918 B. 607 note.

In the absence of ouster, a co-tenant who farms the land on his own account is not liable to account for profits to the others. *Bird v. Bird*, 15 Fla. 424; *Sagen v. Gudmanson*, 164 Iowa 440, 448, 449; *Kean v. Connelly*, 25 Minn. 222; *Webster v. Cales*, 47 N. H. 289. And see *LeBarron v. Babcock*,

and determining when one has received more than his just share: and he becomes, as to that excess, the bailiff of the other, and must account.

But when we seek to extend the operation of the Statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation, than the other, we have insuperable difficulties to encounter.

There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling house, or barn, or room, is solely occupied by one tenant in common, without ousting the other, or a chattel is used by one co-tenant in common, nothing is received; and it would be most inequitable to hold that he thereby, by the simple act of occupation or use, without any agreement, should be liable to pay a rent or anything in the nature of compensation to his co-tenants for that occupation or use to which to the full extent to which he enjoyed it he had a perfect right. It appears impossible to hold that such a case could be within the Statute; and an opinion to that effect was expressed by Lord Cottenham in *M'Mahon v. Burchell*, 2 Phillips's Rep. 134. Such cases are clearly out of the operation of the Statute.

Again, there are many cases where profits are made, and are actually taken, by one co-tenant, and yet it is impossible to say that he has received more than comes to his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, the subject of the tenancy, in a mode in which the money and labor expended greatly exceed the value of the rent

122 N. Y. 153. *Contra*, *Schuster v. Schuster*, 84 Neb. 98; *Hayden v. Merrill*, 44 Vt. 336. See *Gulf Red Cedar Co. v. Crenshaw*, 188 Ala. 606; *Huff v. MacDonald*, 22 Ga. 131; *Cutler v. Currier*, 54 Me. 81; *Ayotte v. Nadeau*, 32 Mont. 498; *West v. Weyer*, 46 Ohio St. 66; *Adkins v. Adkins*, 117 Va. 445.

Nor, in the absence of ouster, is the co-tenant exclusively in possession liable to the others for use and occupation. *Newbold v. Smart*, 67 Ala. 326; *Crane v. Waggoner*, 27 Ind. 52; *Brown v. Thurstin*, 83 Kan. 125; *Israel v. Israel*, 30 Md. 120; *Peck v. Carpenter*, 7 Gray (Mass.) 283; *Moseley v. Moseley*, 132 N. E. (Mass.) 418; *Owings v. Owings*, 150 Mich. 609. Compare *Hamby v. Wall*, 48 Ark. 135; *Buckelew v. Snedecker*, 27 N. J. Eq. 82; *Griffin v. Griffin*, 82 S. C. 256. *Contra*, *McParland v. Larkin*, 155 Ill. 84; *Walker v. Williams*, 84 Miss. 392; *Gage v. Gage*, 66 N. H. 282. See *Woolley v. Schrader*, 116 Ill. 28; *Burkley v. Burkley*, 266 Pa. 338; *Knowles v. Harris*, 5 R. I. 402; *Ward v. Ward*, 40 W. Va. 611.

Authorities are collected in 29 L. R. A. N. s. 224; L. R. A. 1918 B. 606.

A co-tenant who is liable for rents received may be sued in *assumpsit*. *Brigham v. Eveleth*, 9 Mass. 538. See also *Richardson v. Richardson*, 72 Me. 403; *Hudson v. Coe*, 79 Me. 83; *Johnson v. Johnson*, 38 N. D. 138, 146; *Freeman, Cotenancy*, §§ 280-285. *Contra*, *Thomas v. Thomas*, 5 Exch. 28. And see *Enterprise Oil Co. v. National Transit Co.*, 172 Pa. 421.

or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops: and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the co-tenants? The risk of the cultivation, and the profits and loss, are his own; and what is just with respect to the very uncertain and expensive crop of hops is just also with respect to all the produce of the land, the *fructus industriales*, which are raised by the capital and industry of the occupier, and would not exist without it. In taking all the produce he cannot be said to receive more than his just share and proportion to which he is entitled as a tenant in common. He receives in truth the return for his own labor and capital, to which his co-tenant has no right.

In the case before Lord North in *Skinner* (Anonymous in Chancery, Skinn. 230,) in which it is said that, if one of four tenants in common stock land and manage it, the rest shall have an account of the profits, but if a loss come, as of the sheep, they shall bear a part, it is evident, from the context, Lord North is speaking of a case where one tenant in common manages by the mutual agreement of all for their common benefit; for he gives it as an illustration of the rights of a part owner of a ship to an account when the voyage is undertaken by his consent, expressed or implied.

Where the natural produce of the land is augmented by the capital and industry of the tenant, grass, for instance, by manuring and draining, and the tenant takes and sells it, or where, by feeding his cattle with it, he makes a profit by it, the case seems to us to be neither within the words or spirit of the Act, though there are not cases of *fructus industriales* in either case.

It may be observed, however, that the evidence stated in the bill of exceptions does not raise either of these points.

We therefore think that, upon the evidence set out in this case, there was nothing to warrant the jury in coming to the conclusion that the defendant received more than his just share within the meaning of the Act; and that the direction of the learned judge as to the second issue was therefore wrong. And we also think that there was no conclusive or sufficient, or indeed any, evidence that he had the care and management of the farm *for their common profit*, as averred in the declaration. We therefore think that there should be

*Judgment to reverse the judgment of
Q. B., and for a venire de novo.*

DEWING v. DEWING

165 Mass. 230. 1895.

TWO ACTIONS OF CONTRACT, each upon an account annexed, for money had and received. The cases were tried together in the Superior Court, without a jury, before *Dunbar*, J., who found for the defendant in each case; and the plaintiffs alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in November, 1895, and afterwards was submitted on the briefs to all the judges.

HOLMES, J. These are actions for money had and received, brought by two tenants in common against a third, to recover their share of the net profits realized by the defendant in carrying on a garden farm. We assume without deciding, as the plaintiffs contend, that the actions are maintainable in Massachusetts in this form, and that the items on their side of the account stated by the auditor are all properly there. St. 4 & 5 Anne, c. 16, § 27. *Jones v. Harraden*, 9 Mass. 540 n. *Shepard v. Richards*, 2 Gray, 424, 427, 428. The only questions necessary to be considered are whether, as a matter of substantive law, or at least under the answer, which was a general denial, the defendant should have been denied any allowance for his services and board and the use of his animals and utensils in realizing the money received by him, and whether the defendant can recover a proportionate share of the taxes under a declaration in set-off.

The question of pleading raises no difficulty. It is true that this is not a mutual account by contract between the parties, as in *Goldthwait v. Day*, 149 Mass. 185, but the principle is the same. The plaintiff has to prove, in the language of the statute, that the defendant has received "more than comes to his just share or proportion," and that can be determined only after making the defendant all just allowances. *Shepard v. Richards*, 2 Gray, 424, 427.

We are of opinion, further, that the substantive law does not forbid the allowances in question. It is true that there is no contract between the parties. We assume that the defendant could not have recovered for any part of his services if he had been the plaintiff. But when he is asked to account, it is plain that justice may require an allowance for the labor which he has contributed, for the same reasons on which it is admitted that he should be allowed for cash paid out. If the former item is excluded, it is by an arbitrary rule. No such rule is found in the words of the statute. On the contrary, the words "just share" would imply that his share is to be determined by justice, not by a fiction or a technicality. In this Commonwealth it now is settled, that even in the case of a surviving partner continuing to subject the assets of the

firm to the perils of business, there is no inflexible rule against allowing him for his services if the representatives of the deceased partner elect to take a share of the profits. *Robinson v. Simmons*, 146 Mass. 167, 176. *A fortiori* is this true in the case of a co-tenancy of land, where one tenant by his labor has realized the proceeds in which the others claim a share. The same principle applies to the allowance for animals and utensils. *Shepard v. Richards*, 2 Gray, 424, 427. *Ruffners v. Lewis*, 7 Leigh, 720, 738, 743, 744. *Gayle v. Johnston*, 80 Ala. 395, 401, 402. The construction of the statute in England seems to be in accordance with our views. *Henderson v. Eason*, 17 Q. B. 701, 720, 721.

If the foregoing allowances are made, the shares of the profits coming to the plaintiffs are less than their respective shares of the taxes. It is urged that in any event the defendant cannot recover anything from the plaintiffs, and that the judge erred in finding in favor of the defendant for the unpaid proportion of taxes. Unlike the other items, the claim for contribution for taxes paid is one which can be enforced by suit on the part of the tenant who has paid them. *Dickinson v. Williams*, 11 Cush. 258. *Kites v. Church*, 142 Mass. 586. It does not lose this character by being declared on in set-off.¹ True, it is brought into a common account with items which cannot be recovered for except so far as may be necessary in order to extinguish the plaintiff's claim, but otherwise it remains a distinct cause of action. The surplus which the defendant recovers is not the balance of an account most of the items of which cannot be recovered for; it is the claim for taxes alone, so far as that claim has not been satisfied by the sum otherwise due to the plaintiffs.

Looking at the substantive question of policy involved, a majority of the court do not think that it would be just to lay down an absolute rule of law that the expenditures should be marshalled so that the taxes should be paid first out of gross profits, and the balance only applied to the defendant's labor, etc. This would put a co-tenant who had made an honest effort to improve the property at a disadvantage as compared with one who simply had let it lie fallow. In the latter case the claim for taxes would be indisputable. It seems unfair to say that one who tries to make a gain in which all will share if he succeeds, necessarily shall be in a worse position unless he succeeds. *Exceptions overruled.*

¹ And see *Murray v. Ryder*, 115 Atl. (Me.) 256.

CALVERT v. ALDRICH

99 Mass. 74. 1868.

CONTRACT. The defendant filed a declaration in set-off on an account annexed for two fifths of the cost of repairs of a machine shop in Lowell; and the only question in dispute in the case was the liability of the plaintiff for any portion of such cost.

At the trial in the superior court, before *Reed*, J., these facts appeared: Calvert and Aldrich owned the machine shop and the machinery therein in the proportion of two fifths and three fifths respectively, as tenants in common; and Aldrich, having agreed to pay to Calvert a yearly rent for such occupation of Calvert's two fifths, was in occupation thereof when the building caught fire, and the roof, windows and one of the floors were so burnt that the machinery was exposed to injury by the weather. Calvert at this time was in Europe, but had an agent in Lowell, to whom Aldrich immediately represented the importance of repairing the building. The agent confessed such importance, but replied that he had no authority from Calvert to sanction any repairs, and wrote to Calvert for instructions, who replied, declining to make any repairs upon the building. This letter the agent showed to Aldrich, who meanwhile had caused the building to be repaired. After the return of Calvert, Aldrich showed him the repairs and stated to him the expenses thereof, and asked him to contribute his proportion of the same. But Calvert, not disputing that the expenses were reasonable, contended that he was not liable for any portion of them, and refused to contribute.

On these facts the judge ruled that the defendant could not recover on his account in set-off, and ordered judgment for the plaintiff; and the defendant alleged exceptions.

FOSTER, J. The issue in this action is on an account of one cotenant in common against another to recover from the defendant in set-off part of the cost of certain needful repairs made by the plaintiff in set-off upon the common property. It is not founded upon any contract between the parties, but upon a supposed legal obligation which, if its existence were established, the law would imply a promise to fulfil.

The doctrine of the common law on this subject is stated by Lord Coke as follows: "If two tenants in common or joint tenants be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*, and the writ saith *ad reparationem et sustentationem ejusdem domûs teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Lit. 200 *b*; Ib. 54 *b*. And in another place he says: "If there be two joint tenants of a wood or arable land, the one has

no remedy against the other to make inclosure or reparations for safeguard of the wood or corn," but if there be two joint tenants of a house, the one shall have his writ *de reparatione faciendâ* against the other. This is said to be because of "the preëminence and privilege which the law gives to houses which are for men's habitation." *Bowles's case*, 11 Co. 82.

In *Carver v. Miller*, 4 Mass. 561, it was doubted by Chief Justice Parsons whether these maxims of the common law, as applied to mills, are in force here, especially since the provincial statute of 7 Anne, c. 1, revised by St. 1795, c. 74.

In *Loring v. Bacon*, 4 Mass. 575, the plaintiff was seised in fee of a room and the cellar under it, and the defendant of the chamber overhead and of the remainder of the house; the roof was out of repair; the defendant, being seasonably requested, refused to join in repairing it; and thereupon the plaintiff made the necessary repairs, and brought assumpsit to recover from the defendant his proportion of their cost. This, it will be observed, was not a case of tenancy in common, but of distinct dwelling-houses, one over the other. Chief Justice Parsons said: "If there is a legal obligation to contribute to these repairs, the law will imply a promise. We have no statute nor any usage on the subject, and must apply to the common law to guide us." "Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff." It was not absolutely decided that an action on the case would not lie, but the intimations of the court on the subject were such that no further attempt appears to have been made. The relations between tenants in common were not actually involved in this case, and the remarks touching the writ *de reparatione* were only incidental and by way of illustration.

Doane v. Badger, 12 Mass. 65, was an action on the case. The plaintiff had a right to use a well and pump on the defendant's land; and the defendant had removed the pump and built over the well, thereby depriving the plaintiff of the use of the water. The judge before whom the case was tried had instructed the jury that the defendant, by the terms of a deed under which he claimed, was bound to keep the well and pump in repair, although they were out of repair when he purchased, and, without any previous notice or request, was liable in damages for the injury the plaintiff had sustained by his neglect to make repairs. The court held that no such evidence was admissible under the declaration, the cause of action stated being a misfeasance, and the proof offered being of a nonfeasance only; also, that a notice and request were indispensable before any action could be maintained. Mr. Justice Jackson in delivering the opinion made some general observations, unnecessary to the decision of the cause, the correctness of which requires a particular examination. He said that the action on the case seems

to be a substitute for the old writ *de reparatione faciendâ*¹ between tenants in common, and could not be brought until after a request and refusal to join in making the repairs. He added: "From the form of the writ in the register, it seems that the plaintiff, before bringing the action, had repaired the house, and was to recover the defendant's proportion of the expense of those repairs. The writ concludes, '*in ipsius dispendium non modicum et gravamen.*' It is clear until he have made the repairs he cannot in any form of action recover anything more than for his loss as of rent, &c., while the house remains in decay. For if he should recover the sum necessary to make the repairs, there would be no certainty that he would apply the money to that purpose." *Mumford v. Brown*, 6 Cowen 475, a *per curiam* opinion of the supreme court of New York, and *Coffin v. Heath*, 6 Met. 80, both contain *obiter dicta* to the same effect, apparently founded upon *Doane v. Badger*, without further research into the ancient law. If it were true that the writ *de reparatione* was brought by one co-tenant, after he had made repairs, to recover of his co-tenant a due proportion of the expense thereof, there would certainly be much reason for holding an action on the case to be a modern substitute for the obsolete writ *de reparatione*. But all the Latin forms of the writ in the Register, 153, show that it was brought before the repairs were made, to compel them to be made under the order of court. Indeed, this is implied in the very style by which the writ is entitled, *de reparatione faciendâ*, viz: of repairs to be made; the future participle *faciendâ* being incapable of any other meaning. This also appears in Fitzherbert, N. B. 127, where the writ between cotenants of a mill is translated; the words, *in ipsius dispendium non modicum et gravamen*, (quoted by Judge Jackson,) being correctly rendered, "to the great damage and grievance of him," the said plaintiff. Fitzherbert says: "The writ lieth in divers cases; one is, where there are three tenants in common or joint or *pro indiviso* of a mill or a house, &c., which falls to decay, and one will repair but the other will not repair the same; he shall have this writ against them." In the case of a ruinous house which endangers the plaintiff's adjoining house, and in that of a bridge over which the plaintiff has a passage, which the defendant ought to repair, but which he suffers to fall to decay, the words of the precept are, "Command A. that," &c., "he, together with B. and C., his partners, *cause to be repaired.*" The cases in the Year Books referred to in the margin of Fitzherbert confirm the construction which we regard as the only one of which the forms in that author are susceptible, namely, that the writ *de reparatione* was a process to compel repairs to be made under the order of court. There is nothing in them to indicate that an action for damages is maintainable by one tenant in common against an-

¹ See *Ward v. Ward*, 40 W. Va. 611, 617; 52 Am. St. Rep. 934 note.

other because the defendant will not join with the plaintiff in repairing the common property. In a note to the form in the case of a bridge, it is said in Fitzherbert: "In this writ the party recovers his damages, and it shall be awarded that the defendant repair, and that he be distrained to do it. So in this writ he shall have the view *contra*, if it be but an action on the case for not repairing, for there he shall recover but damages." There is no doubt that an action on the case is maintainable to recover damages in cases where the defendant is alone bound to make repairs for the benefit of the plaintiff without contribution on the part of the latter, and has neglected and refused to do so. See *Tenant v. Goldwin*, 6 Mod. 311; *S. C.* 2 Ld. Raym. 1089; 1 Salk. 21, 360.

The difficulty in the way of awarding damages in favor of one tenant in common against his cotenant for neglecting to repair is, that both parties are equally bound to make the repairs, and neither is more in default than the other for a failure to do so. Upon a review of all the authorities, we can find no instance in England or this country in which, between cotenants, an action at law of any kind has been sustained, either for contribution or damages, after one has made needful repairs in which the other refused to join. We are satisfied that the law was correctly stated in *Converse v. Ferre*, 11 Mass. 325, by Chief Justice Parker, who said: "At common law no action lies by one tenant in common, who has expended more than his share in repairing the common property, against the deficient tenants, and for this reason our legislature has provided a remedy applicable to mills." The writ *de reparatione faciendâ* brought before the court the question of the reasonableness of the repairs proposed, before the expenditures were incurred. It seems to have been seldom resorted to; perhaps because a division of the common estate would usually be obtained where the owners were unable to agree as to the necessity or expediency of repairs. Between tenants in common, partition is the natural and usually the adequate remedy in every case of controversy. This is the probable explanation of the few authorities in the books, and of the obscurity in which we have found the whole subject involved. But if we have fallen into any error in our examination of the original doctrines of the common law of England, it is at least safe to conclude that no action between tenants in common for neglecting or refusing to repair the common property, or to recover contribution for repairs made thereon by one without the consent of the other, has been adopted among the common law remedies in Massachusetts.

This result is in accordance with the rulings at the trial.

*Exceptions overruled.*¹

¹ *Merchants Bank of Florence v. Foster*, 124 Ala. 696; *Leigh v. Dickeson*, 12 Q. B. D. 194, *accord*.

But see *Fowler v. Fowler*, 50 Conn. 256; *Cooper v. Brown*, 143 Iowa 482; *Manhattan Co. v. White*, 48 Mont. 565; *Mumford v. Brown*, 6 Cow. (N. Y.) 475; *Beaty v. Bordwell*, 91 Pa. 438; *Duplesse v. Haskell*, 89 Vt. 166.

PICKERING v. PICKERING

63 N. H. 468. 1885.

BILL IN EQUITY, for an accounting between tenants in common. The defendant claimed to be allowed for necessary repairs made by him upon the premises without notice to the plaintiff.

BINGHAM, J. The plaintiff seeks for an accounting, and to charge the defendant for the rents and income of lands and buildings thereon. The parties are tenants in common. The defendant has had the possession and income of the property since December 27, 1883, and has in that time expended \$370 in necessary repairs that materially increased the value of the buildings and the income, and claims to be allowed for the same in the accounting. The plaintiff had no notice of the repairs, and was not requested to join in making them.

If we are to consider it settled at common law that one tenant in common cannot recover of his co-tenant a contribution for necessary repairs, where there is no agreement or request or notice to join in making them, or excuse for a notice not being given to join (*Stevens v. Thompson*, 17 N. H. 103, 111; *Wigging v. Wiggin*, 43 N. H. 561, 568), because both parties, until this is done, are equally in fault, one having as much reason to complain as the other (*Mumford v. Brown*, 6 Cow. 475-477; *Kidder v. Rixford*, 16 Vt. 169-172; 4 Kent Com. 371; *Doane v. Badger*, 12 Mass. 65-70; *Calvert v. Aldrich*, 99 Mass. 78), it does not follow that in this proceeding for an equitable accounting for the income, a part of which is produced by the repairs, the defendant may not be allowed for them. There is a wide difference between a right of action at common law to recover a contribution for repairs, and a right to have them allowed out of the income, which exists in part through their having been made. In the first case, the party makes them at his will on the common property without the consent or knowledge of his co-tenant, while in the last the co-tenant recognizes the existence of the repairs, that they have materially increased the income, but demands the increase and refuses to allow for the repairs. The objection, that no privity, no joint knowledge, no authority existed, is in equity and good conscience waived when the entire income is demanded. It is not unlike the ratification of the acts of an assumed agent: it relates back to the time of making the repairs, and makes the plaintiff a privy from the beginning. He cannot claim the repairs and the income, and equitably ignore the expense of making them.

In *Moore v. Cable*, 1 Johns. Ch. 385, a bill for the redemption of a mortgage, it was decided that the mortgagee should not be charged for rents and profits arising exclusively from repairs made by him.

In *Jackson v. Loomis*, 4 Cow. 168, an action of trespass for mesne profits against a *bona fide* purchaser, it was held that he should be allowed against the plaintiff, in mitigation of damages, the value of

permanent improvements, made in good faith, to the extent of the rents and profits claimed by the plaintiff. *Green v. Biddle*, 8 Wheat 1.

In *Rathbun v. Colton*, 15 Pick. 472, 485, it was decided that when the rent of a trust estate is increased in consequence of improvements made by the trustee, the beneficiary may be put to his election, either to allow the trustee the expense of such improvements, or be deprived of the increase of rent obtained by means thereof; that the question was not whether the trustee has a right to make a charge for the improvements, but whether the plaintiffs were entitled to receive any benefit for them, they refusing to contribute their share towards the expense.

It seems, however, that courts of equity have not confined the doctrine of compensation for repairs and improvements to cases of agreement or of joint purchases, but have extended it to other cases where the party making the repairs and improvements has acted in good faith, innocently, and there has been a substantial benefit conferred on the owner, so that in equity and right he ought to pay for the same. 2 Story Eq. Jur. §§ 1236, 1237, 799 b; *Coffin v. Heath*, 6 Met. 76, 80. And in 2 Story Eq. Pl. § 799 b, n. 1, it is said, — “In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration, without notice seeks an account in equity as plaintiff against such possessor for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all meliorations and improvements which he has beneficially made upon the estate, and thus to recoup them from the rents and profits. . . . So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate beneficial to the owner.” This is on the old, established maxim in equity jurisprudence, that he who seeks equity must do equity. *Hannan v. Osborn*, 4 Paige Ch. 336; *Dech's Appeal*, 57 Penn. St. 468, 472; *Peyton v. Smith*, 2 Dev. & Bat. Eq. 325, 349; *Hibbert v. Cooke*, 1 Sim. & S. 552.

The sum of \$370 for the repairs may be deducted from the income, if it amounts to that sum: if not, then to cancel the income, whatever it may be.

The claim for insurance should be disallowed. It does not appear that it was procured for the plaintiff, or in her interest, or with her knowledge, or that she has ever received or accepted any benefit arising from it.

Case discharged.

BLODGETT, J., did not sit; the others concurred.¹

¹ Compare *Alexander v. Ellison*, 79 Ky. 148; *Hotopp v. Morrison Lodge*, 110 Ky. 987.

LIT. § 247. Also, there is another partition. As if there be four parceners, and they will not agree to a partition to be made between them, then the one may have a writ of *partitio facienda* against the other three, or two of them may have a writ of *partitio facienda* against the other two, or three of them may have a writ of *partitio facienda* against the fourth, at their election.

LIT. § 250. And note, that partition by agreement between parceners may be made by law between them, as well as by parol without deed, as by deed.

Co. LIT. 169 a. Here it appeareth, that not only lands and other things that may pass by livery without deed, but things also that do lie in grant, as rents, commons, advowsons and the like, that cannot pass by grant without deed, whether they be in one county or in several counties, may be parted and divided by parol without deed. But a partition between jointenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the Statutes of 31 H. 8, *cap.* 10, and 32 H. 8, *cap.* 32, because they must pursue that act by writ *de partitio facienda*; and a partition between jointenants without writ remains at the common law, which could not be done by parol. And so it is and for the same reason of tenants in common. But if two tenants in common be, and they make partition by parol, and execute the same in severalty by livery, this is good, and sufficient in law. And therefore where books say, the jointenants made partition without deed, it must be intended of tenants in common and executed by livery.¹

LIT. § 262. Also, if a man be seised in fee of a carve of land by just title, and he disseise an infant within age of another carve, and hath issue two daughters, and dieth seised of both carves, the

On allowance in a partition suit for repairs by a cotenant, see *Drennen v. Walker*, 21 Ark. 539; *McDearman v. McClure*, 31 Ark. 559; *Hogan v. McMahon*, 115 Md. 195; *Ford v. Knapp*, 102 N. Y. 135; *Fassitt v. Seip*, 249 Pa. 576. Compare *Ward v. Ward*, 40 W. Va. 611.

¹ See Freeman, Cotenancy, § 396.

Since the Statute of Frauds parol partition, followed by possession by each co-tenant of the portion allotted to him, has been upheld. *Betts v. Ward*, 196 Ala. 248; *Vaughn v. Harper*, 106 S. E. (Ga.) 100; *Duffy v. Duffy*, 243 Ill. 476; *Breaux v. Hanson Lumber Co.*, 125 La. 421; *Willey v. Bonney*, 31 Miss. 644; *Natchez v. Vandervelde*, 31 Miss. 706; *Wood v. Fleet*, 36 N. Y. 499; *Ebert v. Wood*, 1 Binn. (Pa.) 216; *Mims v. Hair*, 80 S. C. 460; *Meacham v. Meacham*, 91 Tenn. 532. And see *Swift v. Swift*, 121 Ark. 197; *Piatt v. Hubbell*, 5 Ohio 243; *Eaton v. Tallmadge*, 24 Wis. 217; 3 L. R. A. N. S. 806 note.

But see *Duncan v. Sylvester*, 16 Me. 388; *Porter v. Hill*, 9 Mass. 34; *Ballou v. Hale*, 47 N. H. 347; *Williamson v. Wayland Oil Co.*, 79 W. Va. 754; *Johnson v. Wilson*, Willes 248.

As to the nature of a partition deed see *Bornstein v. Doherty*, 204 Mass. 280, 283; *Harrington v. Rawls*, 131 N. C. 39; *Cottrell v. Griffiths*, 108 Tenn. 191; 57 L. R. A. 332 note.

infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as *per case* to the youngest in allowance of the other carve which is allotted to the purparty of the other, if afterward the infant enter into the carve whereof he was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenary with her. But if the youngest alien the same carve to another in fee before the entry of the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other carve; because by her alienation she hath altogether dismissed herself to have any part of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for term of years, or for term of life, or in fee tail saving the reversion to her, and after the infant enter, there peradventure otherwise it is; because she hath not dismissed herself of all which was in her, but hath reserved to her the reversion and the fee, &c.

Co. Lit. 173 b, 174 a. What if the whole estate in part of the purparty of one parcener be evicted by a title paramount; whether is the whole partition avoided, for that Littleton here putteth the case that the whole purparty of the one is defeated?

The second question is, whether if but part of the state of one coparcener be evicted, as an estate in tail, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole?

To the first it is answered, that if the whole estate in part of the purparty be evicted, that shall avoid the partition in the whole, be it of a manor, that is entire, or of acres of ground, or the like that be several; for the partition in that case implieth for this purpose both a warranty and a condition in law, and either of them is entire, and giveth an entry in this case into the whole. And so hath it been lately resolved both in the case of exchange and of the partition.

To the second, if any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoided in the whole. As if A. be seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and he disseise the lessee for life who makes continual claim; A. dieth seised of both acres, and hath issue two daughters; partition is made, so as the one acre is allotted to the one, and the other acre to the other; the lessees enter: the partition is avoided for the whole, and so likewise hath it been lately resolved.

Yet there is a diversity between the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law, she defeateth the partition in the whole. But when she voucheth by force of the warranty in law for part, the partition shall not be defeated in the whole,

but she shall recover recompense for that part. And therein also there is another diversity between a recovery in value by force of the warranty upon the exchange and upon the partition. For upon the exchange, he shall recover a full recompense for all that he loseth. But upon the partition she shall recover but the moiety, or half of that which is lost, to the end that the loss may be equal.¹

LIT. § 290. Also, jointenants (if they will) may make partition between them, and the partition is good enough; but they shall not be compelled to do this by the law; but if they will make partition of their own will and agreement, the partition shall stand in force.

LIT. § 318. Also, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition between themselves by their agreement and consent, such partition is good enough, as is adjudged in the book of assizes.

ST. 31 HEN. VIII. c. 1.² II. Be it therefore enacted by the King our most dread sovereign lord, and by the assent of the Lords spiritual and temporal, and by the Commons, in this present Parliament assembled, that all joint tenants and tenants in common, that now be, or hereafter shall be, of any estate or estates of inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements or hereditaments within this realm of England, Wales, or the marches of the same, shall and may be coacted and compelled, by virtue of this present Act, to make partition between them of all such manors, lands, tenements and hereditaments, as they now hold, or hereafter shall hold as joint tenants or tenants in common, by writ *de participatione facienda*, in that case to be devised in the King our sovereign lord's Court of Chancery, in like manner and form as coparceners by the common laws of the realm have been and are compellable to do, and the same writ to be pursued at the common law.

III. Provided alway, and be it enacted, that every of the said joint tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other or of their heirs, to the intent to dereign the warranty paramount, and to recover for the rate, as is used between coparceners after partition made by the order of the common law; anything in this Act contained to the contrary notwithstanding.

¹ See Rawle, Cov. for Title, 5th ed., §§ 277-279; *Jones v. Bigstaff*, 95 Ky. 395; *Beale v. Stroud*, 191 Ky. 755; *Brown v. Tuschoff*, 235 Mo. 449; *Walker v. Hall*, 15 Ohio St. 355; *Weiser v. Weiser*, 5 Watts (Pa.) 279; *Patterson v. Lanning*, 10 Watts (Pa.) 135.

² The preamble is omitted.

WILLARD v. WILLARD

145 U. S. 116. 1892.

THIS was a bill in equity filed January 3, 1888, by Henry K. Willard against Joseph C. Willard, under the act of August 15, 1876, c. 297, (which is copied in the margin,¹) for partition of land in the city of Washington, bounded on Pennsylvania Avenue on the south, Fourteenth street on the east, and F street on the north, containing more than 33,000 square feet, and with the building thereon known as Willard's Hotel.

The allegations of the bill were that the plaintiff and the defendant were the owners of the land in fee simple, as tenants in common, and each the owner of an undivided half that the plaintiff became and was the owner of his half under a deed from Henry A. Willard, dated December 1, 1887, and duly recorded; and that the plaintiff desired to have partition of the land, and to have his share thereof set apart to him in severalty; or, if in the opinion of the court the land could not be specifically divided between the parties without loss and injury to them and to the purposes for which the land was used, that for the purposes of partition it might be sold, and the proceeds divided between him and the defendant; and he prayed for partition accordingly.

The answer, filed March 6, 1888, alleged that the plaintiff's father, Henry A. Willard, and the defendant were the owners in fee simple, as tenants in common, of the land; and that it was of great value, and for the past twenty-five years and upwards had been leased by Henry A. Willard and the defendant to different persons for hotel

¹ An act relating to partition of real estate in the District of Columbia.

SEC. 1. All tenants in common and coparceners of any estate in lands, tenements or hereditaments, equitable as well as legal, within the District of Columbia, may, in the discretion of the court, be compelled in any court of competent jurisdiction to make or suffer partition of such estate or estates. In proceedings for partition all persons in interest shall be made parties in the same manner as in cases of equity jurisdiction. And in proceedings for partition under this act, the court may, in addition to the powers herein conferred, exercise such powers as are or may be conferred by virtue of the general equity jurisdiction of the court.

SEC. 2. The court, in all cases, in decreeing partition, may, if it satisfactorily appears that said lands and tenements, or any estate or interest therein, cannot be divided without loss or injury to the parties interested, decree a sale thereof, and a division of the money arising from such sale among the parties, according to their respective rights and interests.

SEC. 3. In all such sales, unless the court shall by special order direct or require, on good cause shown, that the sale be made for cash, the purchase money shall be payable one third on day of sale, one third in one year, and one third in two years thereafter, with interest, the deferred payments to be secured to the parties, according to their respective interests, by good and sufficient mortgage upon the premises so sold, which shall be subject to the approval of the court. 19 Stat. 202.

purposes, and was now under lease and used as a hotel at a remunerative rental; that the defendant had no knowledge of the conveyance to the plaintiff, and required proof thereof; and denied that the defendant should be compelled to make or suffer partition of the land, or that it was within the power of the court to deprive him, against his will and without his consent, of his interest and estate in the whole land, either by a partition in severalty or by a sale thereof.

A general replication was filed, and proofs taken, which showed the following facts: The defendant and Henry A. Willard made a lease of the land for five years and four months from January 1, 1884, at an annual rent of \$20,500, to Phœbe D. Cook, which was afterwards assigned, with the lessors' consent, to Orrin G. Staples. On December 1, 1887, Henry A. Willard conveyed to the plaintiff an undivided half of the land, in fee simple, by deed duly recorded. The property was peculiarly adapted to hotel purposes, and was worth in its present condition more than \$600,000, and could not be divided without serious loss.

The court in special term, on July 7, 1888, ordered a sale in accordance with the provisions of the act of Congress, and appointed trustees to make a sale and conveyance, and to pay the proceeds into court. The decree was affirmed in general term, on October 22, 1888. 6 Mackey, 559.

The defendant appealed to this court, and assigned the following errors in the decree:

"1st. The property was under lease for a term of years at the time the bill was filed, and the plaintiff not entitled to possession.

"2d. Under the act of Congress of August 15, 1876, a tenant in common has not an absolute right to partition, but it is discretionary with the court, and something besides the existence of the tenancy must be averred and shown in order to call such discretion into exercise, which was not done in this case."

MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the court.

In a court having general jurisdiction in equity to grant partition, as in a court of law, a tenant in common, whose title in an undivided share of the land is clear, is entitled to partition, as a matter of right, so that he may hold and enjoy his property in severalty. Story Eq. Jur. §§ 653, 656; *Parker v. Gerard*, Ambler, 236; *Calmady v. Calmady*, 2 Ves. Jr. 568; *Wisely v. Findlay*, 3 Rand. 361; *Smith v. Smith*, Hoffman Ch. 506, and 10 Paige, 470; *Donnell v. Mateer*, 7 Iredell Eq. 94; *Campbell v. Lowe*, 9 Maryland, 500.

Under the English statutes of 31 H. VIII, c. 1, and 32 H. VIII, c. 32, in force in the State of Maryland before 1801, and therefore in the District of Columbia, any tenant in common in fee might compel partition at law by division of the estate held in common. Alexander's British Statutes in Maryland, 311, 312, 332; *Lloyd v.*

Gordon, 2 Har. & McH. 254; Rev. Stat. D. C. § 92. It is unnecessary to consider how far the Supreme Court of the District of Columbia had equity jurisdiction in cases of partition before the act of Congress of August 15, 1876, c. 297, because this act expressly empowers the court, exercising general jurisdiction in equity, in its discretion, to compel all tenants in common of any estate, legal or equitable, to make or suffer partition, either by division of the estate, or, if it satisfactorily appears that the estate cannot be divided without loss or injury to the parties interested, then by sale of the estate and division of the proceeds among the parties, according to their respective rights and interests. 19 Stat. 202. This statute, while it authorizes the court to compel a partition by division or by sale, at its discretion, as the facts appearing at the hearing may require, does not affect the general rule, governing every court of law or equity having jurisdiction to grant partition, that partition is of right, and not to be defeated by the mere unwillingness of one party to have each enjoy his own in severalty.

In equity, as at law, a pending lease for years is no obstacle to partition between owners of the fee. Co. Lit. 46a, 167a; Com. Dig. Parcener, C. 6; *Wilkinson v. Joberns*, L. R. 16 Eq. 14; *Hunt v. Hazelton*, 5 N. H. 216; *Woodworth v. Campbell*, 5 Paige, 518; *Thruston v. Minke*, 32 Maryland, 571; *Cook v. Webb*, 19 Minnesota, 167. The decision in *Hunnewell v. Taylor*, 6 Cush. 472, cited by the appellant, was governed by an express statute of Massachusetts authorizing a petition for partition "by any person who has an estate in possession, but not by one who has only a remainder or reversion," which was presently modified by an enactment that partition might be had notwithstanding the existence of a lease of a whole or part of the estate. Mass. Stat. 1853, c. 410, § 1; Gen. Stat. c. 136, §§ 3, 67; Pub. Stat. c. 178, §§ 3, 68. In *Moore v. Shannon*, 6 Mackey, 157, there was an outstanding life estate, so that the plaintiff was not in possession of the freehold, and was therefore denied partition. See Co. Lit. and Com. Dig. *ubi supra*; *Evans v. Bagshaw*, L. R. 8 Eq. 469, and L. R. 5 Ch. 340; *Brown v. Brown*, 8 N. H. 93.

The present bill, after setting forth the titles in fee of the parties, alleges that the plaintiff desires to have partition of the land and his share set apart to him in severalty, or, if in the opinion of the court this cannot be done without injury to the parties and to the purposes for which the land is used, then by sale of the land and division of the proceeds, and prays for partition accordingly. The bill, following the statute, and seeking partition in either mode, as the court in its discretion might think fit, is in proper and sufficient form. Any allegation of special reasons for partition, or for having it made in one way or in the other, would have been unusual and superfluous. The decisions in Maryland, cited by the appellant, were made under statutes authorizing partition only

when it would be for the interest and advantage of the parties that the land should be sold, and therefore held that it must be so alleged in the petition. *Tomlinson v. McKaig*, 5 Gill, 256; *Mewshaw v. Mewshaw*, 2 Maryland Ch. 12.

This disposes of the only errors assigned or argued. It is not denied, and could not be, upon the proofs, that, if the plaintiff was entitled to partition, it was rightly ordered to be made by sale, and not by division of the estate. *Decree affirmed.*¹

MR. JUSTICE BREWER was not present at the argument, and took no part in the decision.

HALL v. PIDDOCK AND OTHERS

21 N. J. Eq. 311. 1871.

THE argument of this cause was had upon the bill, answer and proofs.

THE CHANCELLOR. [HON. ABRAHAM O. ZABRISKIE.] The object of the bill in this case is to restrain partition proceedings commenced at law, and for an equitable partition in this court. Courts of law have jurisdiction of partition, as well as courts of equity, and when proceedings have been commenced at law the tribunal must retain the jurisdiction, and a court of equity will not interfere with it, unless such interference becomes necessary to protect some party thereto from fraud or wrong, or to secure to him some clear right which the law tribunal, from the manner of proceeding before it, cannot secure. For such purpose courts of equity, in exercising one of their principal functions, which is to remedy injustice occasioned by the strict rules of the law and the manner of proceeding in courts of law, will interfere to prevent a failure of justice and loss of rights.

In this case the complainant is tenant in common with the defendant, of an acre of land partly covered with buildings, situate in the county of Hunterdon, of which he owns three-fourths, and the defendant one-fourth. He claims that the buildings on the land were erected by those under whom he derives his title to the three-

¹ See *Wheat v. Wheat*, 190 Ala. 461; *Culver v. Culver*, 2 Root (Conn.) 278; *Drake v. Merkle*, 153 Ill. 318; *Richardson v. VanGundy*, 271 Ill. 476; *Hill v. Sangamon Co.*, 295 Ill. 619; *Calvert v. Calvert*, 297 Ill. 22, 28; *Dustin v. Brown*, 297 Ill. 499; *Tower v. Tower*, 141 Ind. 223; *Carson v. Hecke*, 222 S. W. (Mo.) 850; *Chickamauga Trust Co. v. Lonas*, 139 Tenn. 228; 28 L. R. A. N. s. 125 note; L. R. A. 1918 D 454 note; 12 A. L. R. 644 note.

Partition cannot be obtained by a plaintiff having legal title but not actual possession where the property is held by one claiming adversely to him. *Harrison v. International Silver Co.*, 78 Conn. 417; *Chauncey v. Wollenberg*, 115 Pac. (Oreg.) 419; *Freeman, Cotenancy*, 2d ed., §§ 446, 447. But see *Trainor v. Greenough*, 145 Ill. 543.

fourths, and that no part were erected by the defendants, or those under whom they obtained title.

The land belonged to Abraham Van Horn, who died in 1813. He devised it to his wife for life, and then to trustees for his son Matthew for his life, and at the death of Matthew to his four sons. The widow, Matthew, and three of his sons, conveyed the land to Abraham L. Voorhis, covenanting that the fourth son, George, should convey, when of age. Abraham L. Voorhis conveyed to D. Sanderson, who supposed that the title was perfect, and erected some buildings; Sanderson conveyed to John Hall, who supposed the title good, erected other buildings at considerable expense, and kept a hotel in the mansion-house built by him on the premises. There were no improvements on the premises when conveyed to Abraham L. Voorhis. In 1865 Matthew died, and on the 1st of April of that year his son George conveyed his fourth to the defendants. Hall, believing his title good, denied their right, which they established by bringing an ejectment. The defendants then applied to the Chief Justice for the appointment of commissioners to divide, under the Statute for the more easy partition of lands; and such proceedings were had on that application, that an order for sale was made before the complainant had any knowledge of the proceedings. The regularity and legality of these proceedings are not denied.

These facts stated in the bill are all admitted by the answer, except the allegation of the complainant, that he and those under whom he claims supposed that they had good title to the whole of the premises. Upon this point much evidence has been taken. But as this question, in the view I take of the matter, is not material to the decision, I shall not review this evidence.

The rule that a tenant in common, who has made improvements on the land held in common, is entitled to an equitable partition, is well established, and is hardly disputed by counsel. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants, or encumbering their estate, or hindering partition. And the fact that the tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable partition. No other want of good faith is alleged or contended for by the defendants in this cause.

The peculiarities of an equitable partition are: that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; that when the lands are in several parcels each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be

paid for owelty or equality of partition, by one whose share is too large, to others whose shares are too small; and that where one joint owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part upon which the improvements are, assigned to him at the value of the land without the improvements, or by compensation directed to be made for them.

The doctrine as to allowance for improvements is laid down by Justice Story in 1 Eq. Jur. § 655. It was recognized and acted on by the English Court of Exchequer in equity, in *Swan v. Swan*, 8 Price, 518; by the courts of New York, in *Town v. Needham*, 3 Paige, 553; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Conklin v. Conklin*, 3 Sandf. Ch. 65, and *Green v. Putnam*, 1 Barb. S. C. 500; and by this court, in *Brookfield v. Williams*, 1 Green's Ch. 341; *Obert v. Obert*, 1 Halst. Ch. 397, and *Doughaday v. Crowell*, 3 Stockt. 201.

In *Green v. Putnam* and *Brookfield v. Williams*, as in this case, the improvements were made by tenants in common in reversion during the previous life estate, which was held no bar to the allowance. And in *St. Felix v. Rankin*, *Conklin v. Conklin*, *Doughaday v. Crowell*, *Town v. Needham*, and *Brookfield v. Williams*, the complainants were the parties claiming the allowance; and the allowance in these cases was not made, on the principle that a party asking relief in equity must first do what is equitable himself.

In making the partition in this case, if any can be made without great injury, the share or one-fourth to be allotted to the defendants must, if practicable, be set off from such part of the premises as has no improvements upon it or improvements of small value, and must be equal in value, without improvements, to one-fourth of what would be the value of the whole tract if it had no improvements upon it.

I am not satisfied from the evidence that this tract cannot be partitioned in this manner without great injury. The report of the commissioners appointed by the Chief Justice, and his action in confirming it, do not affect the question as *res adjudicata*. There the direction was to divide the whole premises, including the buildings, into four equal shares, and to assign one share by lot to each of the original tenants in common. I am satisfied that the premises could not be divided in that manner without great prejudice to the owners.

In examining the map annexed to the answer, I see that the northeast side fronts on a public road, and that on the northwest side of the tract a lot of ninety feet in front, with a depth which might be extended to two hundred and forty-five feet, being nearly one-half of the whole tract, has upon it only a granary and a shed. If these are of small value, their value might be disregarded by consent of the complainant; or if they are, as seems probable, build-

ings that can be removed without much loss, the right to remove them within a reasonable time might be reserved to the complainant. Coupled with the right in equity to allow a proper amount as owelty to equalize the partition, the evidence, which consists mainly of the opinions of witnesses without regard to these matters, does not convince me that a partition cannot be made without great injury.

It must, therefore, be referred to a master, to inquire into and report what would be the value of the whole tract if no improvements had been made upon it, and whether some part of the tract upon which no improvements have been made, or only improvements of small value, or that can be removed without material loss, cannot be set off, which will be, without improvements, equal in value to one-fourth of the value of the whole tract so ascertained; or whether such part cannot be set off in that manner by allowing or charging a reasonable sum for owelty; and whether such partition can be made without great prejudice to the owners of the property. And further to inquire into and report what is the present value of the premises with the improvements now standing on them, and also what has been the yearly net value of the premises from April 1st, 1865, when the defendants acquired their title to the one-fourth of it.

The defendants are entitled to such portion of the fourth of the net proceeds of the premises as belongs to the land. The proper way to ascertain and apportion that, is to give to the land such proportion of the whole net yearly value, as the value of the land bears to the value of the whole premises, and to award one-fourth of it to the defendants.

If it shall appear that the premises cannot be divided in the manner directed, a sale must be ordered, and out of the proceeds of the sale a proper allowance made for the value of the improvements put upon the premises. The part of the proceeds to be allowed for the improvements must be such proportion as the value of the improvements, that is the excess of the value of the whole over the value of the land, bears to the value of the whole premises. The cases of *Conklin v. Conklin* and *Green v. Putnam*, are authority for such allowance out of the proceeds of the sale. In the last case, Justice Paige says: "Where one tenant in common lays out money in improvements on the estate, a court of equity will not grant a partition without first directing an account and suitable compensation, or else in the partition it will assign to such tenant in common that part of the premises on which the improvements have been made." And he directs a reference to inquire into the value of the buildings, and by whom paid for, and the amount of rents and profits, and by whom received, so that in case a sale should be ordered the proper allowance might be made.

The costs and expenses incurred by the defendants in the proceedings for partition begun by them, must be allowed out of the

proceeds of sale; those proceedings were authorized by Statute, and were arrested by this court in order that more full equity might be done between the parties than could be done at law.¹

EMSON v. POLHEMUS

28 N. J. Eq. 439. 1877.

THE respondent, Polhemus, and one Hodson were tenants in common of a tract of woodland, of which they made a voluntary partition, by deeds dated August 21st, 1865. These deeds were duly recorded. Before this parting of the property, the appellant, Emson, had recovered a judgment against Hodson, which became a lien on the premises in question; on which judgment, and long subsequent to the partition, that is, on the 8th of August, 1871, a writ of *fiery facias* was issued, and by force of which the sheriff sold and conveyed to Emson the undivided interests of Hodson in the tract. Having obtained a sheriff's deed, Emson took proceedings, under the Act "For the more easy partition of lands held by coparceners, joint-tenants, and tenants in common," for the partition of the premises between himself and the respondent. The latter thereupon filed the bill in this suit to restrain such proceedings; on the final hearing this injunction was made perpetual.

THE CHIEF JUSTICE. [HON. MERCER BEASLEY.] In order to affirm the decree in this case it is necessary to maintain the general proposition, that after a judgment has become a lien on the undivided share of a tenant in common in land, such tenant in common, in concert with those who share the estate with him, can make a voluntary partition that will, if fairly made, be valid with respect to the lien of such judgment.

I have carefully examined the cases which have been cited in support of the proposition thus stated, and I do not find that any of them can be regarded as a precedent in its favor. The nearest approach to adjudications upon the point are those holding that by

¹ See *Porter v. Henderson*, 203 Ala. 312; *Warner v. Logue Realty Co.*, 107 Atl. (Del.) 449; *Manternach v. Studt*, 240 Ill. 464; *Bayley v. Nichols*, 263 Ill. 116, 121; *Berry v. Donald*, 168 Iowa 744; *Ratterman v. Apperson*, 141 Ky. 821; *Kirk v. Crutcher*, 145 Ky. 52; *Hunt v. Meeker County Co.*, 135 Minn. 134; *Warner v. Eaton*, 78 N. H. 515. Compare *Hall v. Collier*, 146 Ga. 815; *McKelvey v. McKelvey*, 83 Kan. 246; *Husband v. Aldrich*, 135 Mass. 317; *Scott v. Guernsey*, 48 N. Y. 106; *Daniel v. Dixon*, 163 N. C. 137; *St. Martin v. Hendershott*, 82 Oreg. 58.

Reimbursement of one co-tenant by another for money spent in the discharge of obligations affecting the land is allowed in partition. *Winsett v. Winsett*, 203 Ala. 373; *Willmon v. Koyer*, 168 Cal. 369; *Price v. Ewell*, 169 Iowa 206; *Hogan v. McMahan*, 115 Md. 195; *Grogan v. Grogan*, 177 S. W. (Mo.) 649. Compare *Maupin v. Gaines*, 125 Ark. 181; *Nott v. Gundick*, 180 N. W. (Mich.) 376; *Clute v. Clute*, 197 N. Y. 439.

force of a voluntary partition made by the husband, the right of dower of the wife will be contracted to the parcel of land so set off to him. But these decisions rest, as it seems to me, on grounds peculiar to themselves. In this particular it is not easy to separate the interests of the husband and wife, they are so nearly identical. If the husband acquires by the partition an advantageous allotment, both he and his wife are equally gainers, and there is a parity of loss to each, if the share set off to the husband be less than his due. The right of the wife is inchoate and contingent, so that the husband cannot prejudice, either from his folly or his fraud, her interest, without, to a greater degree, sacrificing his own. It is not to be wondered at, therefore, that courts have maintained that the act of the husband, in taking to himself his share of undivided land, shall bind the wife so as to attach her dower exclusively to the part so taken. The right of partition is paramount to the right to dower; and when the husband settles the extent of his own right, there seems nothing inconsistent with principle or justice in permitting him to settle, by the same act, the extent of the right of his wife. The judgment, therefore, in *Totten v. Stuyvesant*, 3 Edw. Ch. 500, which maintains this doctrine, is, I think, founded on correct principles. But I also think that it was held with equal propriety, in *Bank v. Hanna*, 6 Ind. 20, that where a husband, being a co-tenant, conveyed his estate by a deed in which the wife did not join, and the grantee, with the other co-tenants, made a voluntary partition, such distribution of the land did not bind the wife after the death of her husband.

But the relation of debtor and creditor is not, in a matter of this kind, to be likened to that of husband and wife, for while the interests of the latter are concurrent, those of the former are adverse; and to give to the debtor the status of the husband in this respect, so that he can affect his creditors, would be both unscientific and impolitic.

A creditor by his judgment, and a mortgagee by his deed, gets a lien on an undivided interest in the land of his debtor, which gives him a fixed and immediate interest, and which is in all respects paramount, as far as it extends, to the right of the debtor in the property. It is obviously undeniable that these lienholders will be materially affected by the allotment of the particular part of such property to which their lien is to be affixed by the law. If the ascertainment of such part be made by an appeal to the judicial power, such creditors have satisfactory guarantees that the division of the land will be fair and just; and hence the propriety of the provision of the Statute of this State, that if, at the time of making partition, a lien exists "upon the undivided estate of any owner, by judgment, decree, mortgage or otherwise, such lien shall thereafter be a lien only on the share assigned or allotted to such owner." Rev. p. 804, § 36. And it should be remarked, in passing, that

the presence in the Statute of a direction of this kind, appears to intimate that an express statutory declaration was necessary to affect the claims of the lienholders, even by a judicial division of the land among the owners. And the question, therefore, is forcibly presented, why should this same force be imparted to the self-directed act of the debtor? In such case what assurance has the creditor that his rights will be adequately protected?

The general rule is, as was said in *Agar v. Fairfax*, 17 Ves. 543, that partition never affects the rights of third parties; and the more I have reflected on this subject, the less I have seen in favor of the proposal to affect the mortgagee or judgment creditor by the voluntary partition of the debtor. I can yield no force at all to the suggestion that "the fact that the parties to the partition may be compelled to partition by legal proceedings, is a sufficient ground for upholding such a voluntary partition as would have been made at law." Such a rule, and the reasoning that supports it, would validate a partition, if a fair one, which should be made by a single tenant in common as against his co-tenants. Nor can I perceive why, because an infant to a certain extent, and retaining a qualified power when of age of repudiating the act, may bind his own interest by joining in a partition, a tenant in common should be permitted by his act, not only to affect his own interest, but likewise the interest of his non-assenting creditors. The terms of these several propositions appear to my mind to have nothing in common, and consequently the legitimate deduction that may be made from the one is no warrant for drawing a similar conclusion from the other.

The principal argument, however, which is urged to uphold the power of the debtor to make a partition by his private action that will be obligatory on his creditor who holds a lien on the land is, that if the partition thus made, is not fair, it can be set aside. But this contention will, upon examination, be found to be destitute of all real force. It substitutes a remedy for a wrong committed, in the place of a remedy against the commission of such wrong. The safeguard against an unfair separation of the rights of the co-tenants which in a judicial procedure is provided, is the substitution of the judgment of discreet and unprejudiced men, instead of the notions of the owners of the property. The proposed rule would take away from the creditor this safeguard, and in lieu of it place in his hands the cumbersome privilege of overhauling, if he can show unfairness, the act of the co-tenants. All persons will see that by such substitution, the creditor is placed at disadvantage, and has, in reality, lost a valuable right. The fact is, the creditor should have both rights, viz. : the right to a partition by unprejudiced persons, and the right to litigate an unfair partition, even if made by such persons. But the contention in question deprives him of the former of such rights, and gives him no equivalent.

There is a further objection of magnitude. The rule proposed would leave the lienholder subject to the caprice or folly of his debtor in the act of agreeing to partition. When a tenant in common is competent to contract, his agreements with his co-tenants respecting the partition of his land are as binding upon him as are his contracts on any other subject. In the absence of fraud, an unequal partition assented to by such tenant is not, in legal estimation, an unfair one that will be set aside. If, by the exercise of a superior judgment, certain of the tenants in common gain an advantage, the proceeding, on that account, is not invalid. "If coparceners, joint-tenants, or tenants in common, seised in fee simple, make partition, it is good forever, though the value of the different shares taken in severalty be unequal." Such is the rule as propounded by Allnatt, p. 30. The consequence is, that the lienholder, if the rule contended for is to prevail, will, in place of the discretion of men selected judicially, be thrown on the judgment of the debtor, and will be bound by the exercise of such judgment, in the absence of actual fraud, whether such debtor be a frivolous person or a man of sense. In the absence of controlling authority it is not conceived why the judgment creditor should be placed in a position so unfavorable.

There are many other objections which, on reflection, will present themselves. A partition would often be of a kind which, while it would be perfectly fair and just between the parties, and which, therefore, could not consistently with established rules be set aside, yet would be quite ruinous to the interests of the creditor. For example, in a case where the co-tenants agree to divide between themselves the rooms of a house: such distribution is entirely legal, and if the power to make a voluntary partition exists at all, could not be impeached; and yet such an interest, regarded as a salable article under an execution, might be of little value. Conceding to the judgment debtor the capacity to make voluntary partition, what is to be done with arrangements of this nature? It is obvious they would be valid in law, and they would have to be sustained against the judgment creditor or mortgagee.

So, I think, this power of partition, if it existed, would often be turned to purposes of fraud and vexation. Suppose a creditor has advertised for sale, by force of his judgment and execution, the undivided interest of his debtor in certain lands, and on the eve of such sale he should ascertain that his debtor has made a division of such lands with the co-tenants, which he deems unfair — what is his remedy? Certainly a most oppressive and inefficient one. All that he could do would be to stop his proceedings under his execution, and file his bill in equity to test the fairness of such partition. All persons can see that such a remedy would not often be resorted to unless where the unfairness was very gross and the consequent loss to the creditor of magnitude. By such a practice ordinary

frauds could be perpetrated with absolute impunity. I have little doubt that if it were known that debtors have the power which is claimed by the respondents, that these partitions, unfair upon their very face, would oftentimes be made in order to procure a virtual stay of execution, by driving creditors, who were about selling under their judgments, into a court of equity to obtain a redivision of the property before exposing it for sale.

All these evils and iniquities will be avoided by holding that the debtor, after mortgage or judgment, cannot make a voluntary partition which will bind such lienholders. Such a doctrine imposes no hardship on the debtor and his co-tenants. If they desire a separation of their interests they can pursue the legal formulary; that method is simple, expeditious, and inexpensive, and by its use the interest of all parties, those of mortgagees and judgment creditors, will be protected.

It seems to me of importance to establish this as the legal course of practice in this State; and I shall, consequently, vote to reverse the decree in the present case.¹

For reversal — BEASLEY, C. J., DALRIMPLE, DEPUE, SCUDDER, VAN SYCKEL, WOODHULL, LATHROP — 7.

For affirmance — DIXON, KNAPP, CLEMENT, LILLY — 4.

MARKS v. SEWALL AND OTHERS

120 Mass. 174. 1876.

APPEAL by David L. Marks from the decree of the Probate Court accepting the report of the commissioners appointed to make partition of the real estate of Moses B. Sewall, deceased, and confirming and establishing the partition.

At the hearing before *Morton, J.*, it appeared that Moses B. Sewall died in March, 1872, seised of the following among other parcels of real estate: A lot of vacant land on High Street, Boston, containing 4875 square feet valued at \$97,500, and a lot of land with buildings thereon on Monument Avenue, Charlestown, containing 3177 square feet, valued at \$12,500.

¹ And see *Simmons v. Gordon*, 98 Miss. 316.

Contra. *Williams College v. Mallett*, 12 Me. 398; *Bavington v. Clarke*, 2 Pen. & W. (Pa.) 115; *Long's Appeal*, 77 Pa. 151; *Port v. Parfit*, 4 Wash. 369. See *Staples v. Bradley*, 23 Conn. 167; *Manley v. Pettee*, 38 Ill. 128; *Torrey v. Cook*, 116 Mass. 163.

Compare cases on compulsory partition. *Belts v. Ward*, 196 Ala. 248, 257 (statute); *Loomis v. Riley*, 24 Ill. 307; *Hawes v. Nason*, 111 Me. 193 (statute); *Thruston v. Minke*, 32 Md. 571, 574; *Colton v. Smith*, 11 Pick. (Mass.) 311; *Hunt v. Meeker County Co.*, 135 Minn. 134; *Jackson v. Pierce*, 10 Johns. (N. Y.) 415; *Harwood v. Kirby*, 1 Paige (N. Y.) 469; *Ukase Inv. Co. v. Smith*, 92 Oreg. 337; *Wright v. Strother*, 76 Va. 857; *Sinclair v. James*, [1894] 3 Ch. 554.

Sewall left as his heirs four daughters, Mary F. Wales, wife of T. C. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, and two sons, Charles H. Sewall and George P. Sewall. Charlestown became a part of Boston, by annexation, on January 1, 1874.

Charles H. Sewall, on February 1, 1873, mortgaged to David L. Marks an undivided sixth part of the estate on High Street, Boston, the same being described by metes and bounds, as security for the payment of his note for \$10,000, payable in five years from date, with interest quarterly, at the rate of seven per cent. per annum, and on the same date Marks executed an instrument recorded with the mortgage, wherein he recited the mortgage and declared that the note and mortgage were held by him in trust that Charles H. Sewall should pay him for the support and maintenance of Ellen M. Sewall, wife of Charles H., and daughter of said Marks, and for the support and maintenance of the infant daughter of Charles H. and Ellen M. Sewall, during their lives or the life of either of them, the sum of \$700 per annum, in quarterly payments, and to secure to Mrs. Sewall the care and custody of their child.

On April 22, 1874, the Probate Court appointed commissioners to make partition of all the real estate of Moses B. Sewall, which any party interested should require to have included in the partition among the heirs aforesaid, and they reported as follows: "Whereas the said lot of land, situated on High Street in the city of Boston, is of greater value than the share of either party, and cannot in our judgment be divided without damage to the owners, and whereas George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall are willing to have said lot of land set off to them together, and to pay to Charles H. Sewall such sum of money as may be awarded: we have set off and assigned to the said George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, the said lot of land situated on High Street, in said city of Boston, to be held by them in common, but separate from the share of Charles H. Sewall, and we have awarded that they shall pay to the said Charles H. Sewall the sum of \$5833.33 to make the partition just and equal. And we have set off and assigned to the said Charles H. Sewall said lot of land, situated in that part of said city of Boston which was recently the city of Charlestown, Charles H. Sewall to receive from the said George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, the sum of \$5833.33, to make the partition just and equal." Their report was accepted, November 11, 1874, and the partition confirmed and established. From this decree David L. Marks appealed, and assigned the following reasons:

"Because the decree did not set off to said Marks his interest in the High Street estate, or award payment in money therefor; and because the money awarded by the commissioners had not been paid to said Marks, he being entitled thereto, or secured to his satisfaction, or to the satisfaction of the Probate Court."

It appeared that the heirs to whom the High Street estate was set off were able to pay the value of Charles H. Sewall's interest therein, in case partition of that estate by itself should be made, the entire estate set off to them, and it should be awarded that the value of Charles H. Sewall's interest should be paid in money. Further it appeared that Charles H. Sewall had refused and still refused to agree to the substitution of any other security on the note given by him to Marks.

Upon these facts the judge affirmed the decree of the Probate Court, and upon request of Marks, reported the case for the consideration of the full court.

DEVENS, J. It is conceded, as a general proposition, that a tenant in common, as against his co-tenants, cannot convey his interest in a specified parcel of the lands held in common. *Adam v. Briggs Iron Co.*, 7 Cush. 361, and authorities cited. It is, however, argued that, as when the conveyance was made by Charles H. Sewall, it purported to convey his interest in the High Street estate, which was all the land then lying in the county of Suffolk, and that as it was then in the power of the judge of probate to have issued a separate warrant and caused a separate partition to have been made of the lands lying in that county, (Gen. Sts. c. 136, § 50.) the conveyance may here be treated as valid against the co-tenants. But it was in the power of the Probate Court then, by one commission, to have made partition of all the real estate lying within the state, (Gen. Sts. c. 136, § 48,) and at the time when the commission was actually issued, both parcels which were to be divided had, by the annexation of territory of Charlestown, become a part of the county of Suffolk. The mere fact that, but for the occurrence of this latter contingency, the Probate Court could have divided the lands of the deceased by separate commissions, does not entitle the appellant to claim that he would then have had, or that he now has, a right to have the High Street estate separately divided.

If, as against the co-tenants, the mortgage made by Charles H. Sewall is invalid, the court should not refuse to confirm the decree for partition. While the court may, for sufficient reason, set aside the return of the commissioners and recommit the case, (Gen. Sts. c. 136, § 74,) yet the reason for so doing should be because there is some objection to the return as made, and not because one might be made which would facilitate other proceedings before another tribunal by the appellant against Sewall. If, treating the mortgage as invalid, the partition is a fair and just one, it should be confirmed.

Nor, if the partition is thus confirmed, is the appellant entitled to have the sum of \$5833.33 (which is the amount in money to be paid to Charles H. Sewall) first paid or secured to him. It is a part indeed of the proceeds of that portion of his inheritance which Sewall assumed to convey to the appellant; but if the mortgage be invalid as to them, the co-tenants have the right here to have the

partition confirmed without regard to any relations which may exist between Sewall and the appellant. *Decree affirmed.*¹

"JOINT OWNERSHIP IN PERSONAL PROPERTY.—Personal property may be held jointly or in common. There is of course no interest corresponding to coparcenary in real estate. A conveyance of personal property to two or more simply makes them joint owners; but there are special rules as to partners and the owners of ships. The modern Statutes which declare that a conveyance to two or more shall presumptively be taken to create a tenancy in common, have sometimes no application to personal property.

"Each joint owner or owner in common of a chattel personal has a right to the possession, and no action of trespass or trover lies against him at the suit of his co-owner for taking or keeping possession of it. [*Hamby v. Wall*, 48 Ark. 135; *Doyle v. Bush*, 86 S. E. (N. C.) 165.]

"But I. It seems that trespass will lie by an owner in common of a chattel personal against his co-tenant for the destruction of the chattel. See Co. Lit. 200 a.

"II. Trover lies at the suit of an owner in common of a chattel personal against his co-owner for so dealing with the chattel as to render any future use of the chattel by the plaintiff impossible. See, for example, *Needham v. Hill*, 127 Mass. 133 (1879). The cases are collected Freem. Co-ten. §§ 306, 307, 312-318. [*Hennes v. Hebard*, 169 Mich. 670.]

"III. Whether a sale of a chattel personal by an owner in common, who represents himself as the sole owner and professes to pass the title to the whole chattel, be a conversion, is a question which has been much mooted. The weight of authority in the United States is in the affirmative. See the cases collected in Freem. §§ 308-311. [*Johnson v. McFry*, 68 So. (Ala.) 716; *Howton v. Mathias*, 73 So. (Ala.) 92; *Merrill v. Mason*, 159 Mo. App. 605; *Goodrich v. Chappell*, 90 Vt. 263.]

"IV. If there are owners in common of chattels of the same quality and readily divisible, such as grain, it is commonly held in America that one of them may claim the right to take his share, and if he is refused, may maintain trover,—see 2 Kent Com. (12th ed.) 365, note 1; Freem. § 252; *Lobdell v. Stowell*, 51 N. Y. 70 (1872),—or even replevin, *Young v. Miles*, 20 Wis. 615 (1866); *Piazzek v. White*, 23 Kans. 621 (1880). [*Halsey v. Simmons*, 85 Oreg. 324; 37 L. R. A. N. s. 267 note.]

"There is no mode of obtaining partition of chattels personal at law, unless replevin of grain, &c. (see IV. *supra*), be so considered. A bill in equity for partition of personal chattels is allowed at the present day in many of the States; the first time such a bill was sustained seems to have been *Smith v. Smith*, 4 Rand. 95 (1826). See Freem. § 426." [*Muldrow v. Mixon*, 89 S. C. 551; 27 L. R. A. N. s. 618 note.]—6 Gray, Cas. on Prop., 2d ed., p. 580. [The citations in brackets are by the editor.]

¹ So *Stewart v. Allegheny National Bank*, 101 Pa. 342. But see *Whitton v. Whitton*, 38 N. H. 127; *Green v. Arnold*, 11 R. I. 364. Compare *Huffman v. Darling*, 153 Ind. 22; *King v. King*, 182 Ky. 665; *Jordan v. Faulkner*, 168 N. C. 466; *Holley v. White*, 172 N. C. 77; *Kennedy v. Boykin*, 35 S. C. 61; *Easley v. Easley*, 78 Wash. 505; *Helmick v. Kraft*, 84 W. Va. 159; note, *ante*, p. 427.

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CHAPTER VIII
CREATION OF EASEMENTS AND PROFITS¹

SECTION I

BY IMPLICATION

SAUNDEYS *v.* OLIFF ✓

Moore 467. 1597.

TRESPASS. The defendant prescribes for common, and counts that one Verny, Knight, was seised in fee of the messuage and place where &c. and that he granted the messuage with all the commons appurtenant; and avers that all the tenants of the messuage have used to have common in the place where &c. And it is adjudged against him who so prescribed, because there appears to have been unity of possession of the messuage and of the Lower Cow Pasture, (being the place where &c.,) in Verny, in which case the common is extinct, and then cannot pass by words of common appurtenant and regarding the messuage.² But "all commons usually occupied with the messuage" would have passed such common as the first was.

NICHOLAS *v.* CHAMBERLAIN ✓

Cro. Jac. 121. 1606.

TRESPASS. It was held by all the court upon demurrer, That if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, *et quasi* appendant ✓ thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them.

¹ See Warren, *Cas. on Prop.*, pp. 751-787.

² But see *Thomas v. Owen*, 20 Q. B. D. 225, 231-232; *Hansford v. Jago*, [1921] 1 Ch. 322-331.

But by POPHAM, Chief Justice, if the lessee erect such a conduit, and afterward the lessor, during the lease, sell the house to one, and the land wherein the conduit is to another, and after the lease determines; he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it; because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is, if a disseisor of an house and land erect such a conduit, and the disseisee re-enter, not taking conusance of any such erection, nor using it, but presently after his re-entry sells the house to one, and the land to another; he who hath the land, is not compellable to suffer the other to enjoy the conduit. — But in the principal case, by reason of the mispleading therein, there was not any judgment given.

CLARK v. COGGE

Cro. Jac. 170. 1607.

TRESPASS. Upon demurrer the case was, The one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the plaintiff's land, there being no other convenient way adjoining: and, Whether this were a lawful claim? was the question.

And it was resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his land: *et e converso*, if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it, as reserved unto him by the law; and there is not any extinguishment of a way by having both lands. Wherefore it was adjudged accordingly for the defendant.¹

PACKER v. WELSTED

2 Sid. 39, 111. 1658.

SPECIAL verdict. There are three parcels of land, and the necessary and private way is out of the first parcel to the second, and out of the first two parcels to the third parcel. J. S. purchases all these parcels, and then aliens the first two of these parcels to J. N., and the question was, if he shall have a way over the first two parcels to his third parcel. The jurors also found that the alienation was by feoff-

¹ See *Howton v. Frearson*, 8 T. R. 50; 1 Wms. Saunders 323, note 6.

ment, and that there was no other way to come to the land not aliened but by the other land.

GLYN, C. J. If one has a highway on his land and makes a feoffment of the land, yet can he, as subject of the King, use the way. But our case is of a private way, which, as the case is, cannot be called a way properly, because it was to be taken on his own land. But the jurors having found it to be of necessity, it seems to me that the way remains, for it is not only a private inconvenience, but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied; and so has been the opinion of the Lord Rolles, as I hear on the circuit at Winchester.

And the defendant can take a convenient way without the leave of the plaintiff and the law can then adjudge if it is convenient and sufficient [*vel plus ou nemy*] and by all the court judgment was given for the defendant that the unity had not destroyed the way, but that the way continues.

PALMER v. FLETCHER

1 Lev. 122. 1663.

CASE was brought for stopping of his lights. The case was, A man erected a house on his own lands, and after sells the house to one, and the lands adjoining to another, who by putting piles of timber on the land, obstructed the lights of the house: And 'twas resolved, That although it be a new messuage, yet no person who claims the land by purchase under the builder, can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by TWYSDEN and WYNDHAM, Justices, HYDE being absent, and KELYNGE doubting. For the lights are a necessary and essential part of the house. And KELYNGE said, Suppose the land had been sold first, and the house after, the vendee of the land might stop the lights. TWYSDEN to the contrary said, Whether the land be sold first or afterward, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees; and cited a case to be so adjudged; but all agreed, that a stranger having lands adjoining to a messuage newly erected, may stop the lights; for the building of any man on his lands, cannot hinder his neighbor from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription. And afterwards in Mich. 16 Car. 2, B. R. a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.¹

¹ s. c. *sub nom.* *Palmer v. Fleshees*, 1 Sid. 167. See *Compton v. Richards*, 1 Price 27; *Rigby v. Bennett*, 21 Ch. D. 559; *Birmingham, etc. Banking Co., v. Ross*. 38 Ch. D. 295.

✓
PINNINGTON v. GALLAND

9 Ex. 1. 1853.

MARTIN, B.¹ This is a special case, which was argued before us during the last term; and the question is, whether the plaintiff, as occupier of two closes called the Rye Holme closes, is entitled to a right of way over certain lands of the defendant.

The material circumstances are these: In the year 1839 a property consisting of five closes belonged to a Mr. Dickinson. Two of them were the Rye Holme closes, and they were separated by two of the others from the only available highway, the Town-street of Sutton-upon-Trent. From the year 1823 the road over which the plaintiff now claims the right of way was that which was used by Mr. Dickinson's tenant for the occupation of the Rye Holme closes. From a plan, which forms part of the case, the road appears to be the shortest and most direct access from the highway to the closes; and it having been used for so many years by the tenant who occupied the entire property, we think we may safely conclude that it was, and is, the most convenient road.

In 1839 the property was sold by Mr. Dickinson in three lots. A Mr. Moss purchased the Rye Holme closes, a Mr. Newboul purchased one of the other closes, and a Mr. Dearle purchased the remainder of the property, which includes that now belonging to the defendant, and over which the way in question goes. The deeds of conveyance to the three purchasers, although bearing different dates, were all executed on the same day, the 8th of April, 1840, and it cannot now be ascertained in what order of priority they were executed. No special grant or reservation of any particular way is contained in any of them; but in the conveyance to Mr. Moss, whose tenant the plaintiff is, there is comprised the usual words, "together with (*inter alia*) all ways, roads, paths, passages, rights, easements, advantages, and appurtenances whatsoever to the said closes belonging, or in any way appertaining." Mr. Dearle executed the deed of conveyance to him.

For several years after the execution of the conveyances, the occupier of the Rye Holme closes continued to use the road in question; but in 1843 the defendant, who had purchased from Mr. Dearle part of the land conveyed thus by Mr. Dickinson, and over which the way in question goes, disputed the plaintiff's right to use it. Attempts were made for arrangement, which failed, and we are now required to decide the point; and we are of opinion that the plaintiff, as occupier of the Rye Holme closes, is entitled to the right of way claimed.

It is impossible to ascertain the priority of the execution of the two conveyances (that to the third purchaser may be put out of consideration), and the plaintiff, having to establish his right, is bound

¹ Only the opinion is here given.

to show that, whichever was the first executed, he nevertheless is entitled to the right of way.

First, assume that the conveyance to Mr. Moss was executed before that of Mr. Dearle. In this case there would clearly be the right of way. It is the very case put by Mr. Serjt. Williams in his note to *Pomfret v. Ricroft*, 1 Wms. Saund. 323, viz., "where a man having a close surrounded with his land, grants the close to another in fee, for life, or for years, the grantee shall have a way over the grantor's land, as incident to the grant, for without it he cannot have any benefit from the grant," and the way would be the most direct and convenient, which we think we may properly assume the one in question in the present case to be. This is founded upon the legal maxim, "*Quando aliquis aliquid concedit, concedere videtur et id sine quo res concessa uti non potest*," which, though it be clearly bad Latin, is, we think, good law.

Secondly, assume that the conveyance to Mr. Dearle was executed the first. In this case the Rye Holme closes were for a short period of time the property of Mr. Dickinson, after the property in the land conveyed to Mr. Dearle had passed out of him. There is no doubt, apparently, a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority, the law is the same, for the note proceeds thus: "So it is when he grants the land and reserves the close to himself;" and he cites several authorities which fully bear him out: *Clark v. Cogge*, Cro. Jac. 170; *Staple v. Heydon*, 6 Mod. 1; *Chichester v. Lethbridge*, Willes, 72, note. It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton v. Taylor*, 2 Lutw. 1487, that it was for the public good, as otherwise the close surrounded would not be capable of cultivation. ✓

According to this law, therefore, the right of way would accrue to Mr. Dickinson upon the execution of the conveyance to Mr. Dearle, and it would clearly pass to Mr. Moss under his conveyance, for it would be a way appurtenant to the Rye Holme closes, and would pass under the words "*all ways to the closes belonging or appertaining*," and, indeed, probably without them. The plaintiff has vested in him, as Mr. Moss's tenant, all his rights of way; and, for the above reason, we think that he is entitled to the judgment of the court.

There is a statement in the case respecting another road described in the plan as from C to D, which the defendant contends was the plaintiff's proper way. But it is perfectly clear, that, whatever may be the rights of the occupiers or owners of the two closes further to the east, called Maples and Catliffe closes, and which were sold and conveyed by Mr. Dickinson before the sales to Mr. Moss and Mr. Dearle, Mr. Moss or the plaintiff his tenant, upon the statement in the present case, has no right to the use of it; and, except by one or

other of the roads, the case states that the plaintiff could not get to the Rye Holme closes without being a trespasser upon land other than Mr. Dickinson's.

*Judgment for the plaintiff.*¹

HILDRETH v. GOOGINS

91 Me. 227. 1898.

On motion and exceptions by defendant.

The case appears in the opinion.

STROUT, J. The controversy in this case, is whether there is a right of way from the lot of land occupied by the defendant at Old Orchard as tenant of the heirs of William Emery, over and across the plaintiff's land to the street, as appurtenant to defendant's lot. At the trial below the right of way was claimed first by deed, second by prescription, and third by necessity. The evidence failed to sustain either of the first two claims and they are abandoned here. But it is strenuously contended that a way of necessity exists from defendant's lot, across that of plaintiff.

Lawrence Barnes on June 15, 1871, owned in one tract the land, part of which is now owned by the plaintiff, and part by the heirs of William Emery. On that day he conveyed to one Seavey that part of the land now occupied by defendant. William Emery derived

¹ See *Ellis v. Blue Mt. Forest Ass'n*, 69 N. H. 385; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Davies v. Sear*, L. R. 7 Eq. 427; 8 L. R. A. N. s. 327 note.

As to the location of a way of necessity, see *Ritchey v. Welsh*, 149 Ind. 214; *Herrin v. Sieben*, 46 Mont. 226; *Fritz v. Tompkins*, 168 N. Y. 524, 532.

A right of a way of necessity does not arise when the land is acquired by escheat, *Proctor v. Hodgson*, 10 Ex. 824. Nor when it is taken by condemnation proceedings, *Banks v. School Directors*, 194 Ill. 247; but see *Cleveland Ry. Co. v. Smith*, 177 Ind. 524.

On creation or reservation of way of necessity when land is taken on execution, see *Damron v. Damron*, 119 Ky. 806; *Pernam v. Wead*, 2 Mass. 203; *Russell v. Jackson*, 2 Pick. (Mass.) 574; *Schmidt v. Quinn*, 136 Mass. 575. Compare *Assets Inv. Co. v. Hollingshead*, 200 Fed. Rep. 551; *Bean v. Bean*, 163 Mich. 379; *Kieffer v. Imhoff*, 20 Pa. 438; *Proudfoot v. Saffle*, 62 W. Va. 51; 12 L. R. A. N. s. 482 note. On grant by the government, see *United States v. Rindge*, 208 F. R. 611; *Herrin v. Sieben*, 46 Mont. 226; *Parne v. Coal Creek Co.*, 90 Tenn. 619.

A grantor is not debarred from having a way of necessity because his deed has a covenant for warranty, *Jay v. Michael*, 92 Md. 198; *Brigham v. Smith*, 4 Gray (Mass.) 297; *N. Y. & N. E. R. R. v. Railroad Commissioners*, 162 Mass. 81. Compare *Reed v. Blum*, 215 Mich. 247; *Bennett v. Booth*, 70 W. Va. 264.

As to what evidence is admissible to rebut the implication of a way of necessity, see *Greenwood v. West*, 171 Ala. 463; *Seeley v. Bishop*, 19 Conn. 128; *Leebus v. Boston*, 21 Ky. Law Rep. 411; *Doten v. Bartlett*, 107 Me. 351; *Orpin v. Morrison*, 230 Mass. 529; *Ewert v. Burtis*, 12 Atl. (N. J.) 893; *Bascom v. Cannon*, 158 Pa. 225.

69 N.H. 385

title under this deed through mesne conveyances. Barnes' deed to Seavey did not contain any grant of a right of way across Barnes' remaining land. Plaintiff derives his title through deed from Barnes to Francis Milliken, dated October 16, 1879, and mesne conveyances. The land owned by the Emery heirs is bounded on one side by the ocean. No access to it from the street can be had, except by the ocean or crossing land of other owners. Under these circumstances it is claimed that the conveyance by Barnes to Seavey implied a grant of a way over and across the plaintiff's lot, then owned by Barnes, as appurtenant to defendant's lot.

"Implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored, except in cases of strict necessity, and not from mere convenience." *Kingsley v. Land Improvement Co.*, 86 Maine, 280. In that case it was held by this court, that as free access to the land over public navigable waters existed, a way by necessity over the grantor's land could not be implied. The same rule applies here. Defendant's land borders on the ocean, a public highway, over which access to her land from the street can be had. It may not be as convenient as a passage by land, but necessity and not convenience is the test. *Warren v. Blake*, 54 Maine, 276; *Dolliff v. B. & M. R. R.*, 68 Maine, 176; *Stevens v. Orr*, 69 Maine, 324. There is no evidence in the case that the water way is unavailable. The court instructed the jury that the ocean was a public highway, and to a question by a juror, "whether the ocean was a public highway, if it was not available, and whether it was for the jury to decide whether it is available in the present case," the court replied, "that if there was any evidence as to availability it was for them to decide; but if there was no evidence, they must assume that it was available." They were further instructed "that cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have, and I give now the general instruction that, nothing appearing to the contrary, the ocean is a highway."

Exception is taken to these instructions. But they are so clearly in consonance with well-established principles, and the decisions of this court, that it is unnecessary to discuss them. *Kingsley v. Land Improvement Co.*, *supra*; *Rolfe v. Rumford*, 66 Maine, 564.

We perceive no reason for disturbing the verdict, upon the motion.

*Motion and exceptions overruled.*¹

¹ "The instruction on this subject was, 'that the deed under which the plaintiff claimed conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in the power of the grantor to convey; that it was not enough for the plaintiff to prove that the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her intestate's house, without unreasonable labor and expense; that unreasonable labor and expense means excessive and disproportionate to the value of the property pur-

RICHARDS v. ROSE

9 Ex. 218. 1853.

THE first count of the declaration stated, that the plaintiff was the owner of a certain messuage and dwelling-house, and was entitled to have the same supported by certain land and premises of the defendant adjoining thereto; yet that the defendant wrongfully and unlawfully dug, excavated, and made a drain-hole and tunnel, and removed and took away part of the said land of the defendant, and thereby deprived the said messuage and dwelling-house of the plaintiff of the said support to which she was lawfully entitled, whereby the walls, and parts of the said house cracked, gave way, and were damaged.

The second count charged the defendant with having negligently, &c., dug the drain, whereby the walls of the said dwelling-house were undermined, cracked, and damaged.

The defendant pleaded, first, Not guilty to the whole declaration; and secondly, to the first count, that the plaintiff was not entitled to have her said messuage or dwelling-house supported by the said land and premises of the defendant adjoining thereto. Upon which pleas issues were joined.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after last term, it appeared that the plaintiff's and defendant's houses ad-

chased; and that it was a question for the jury, on all the evidence, whether such new way could be made without such unreasonable labor and expense.'

"The court are of opinion that this instruction was correct. The word 'necessary' cannot reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land, if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of one hundred thousand dollars. If the word 'necessary' is to have a more liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was, to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling-house granted. See *Ewart v. Cochrane*, 7 Jur. N. S. 925; *Leonard v. Leonard*, 2 Allen, 543; *Carbrey v. Willis*, 7 Allen, 364.

"As the facts were properly submitted to the jury, and evidence was admissible as to the consideration paid for the land and the cost of making a way, it was proper that the jury should compare the facts together and make such inferences as they should think reasonable. The instruction on this point was correct." — *Pettingill v. Porter*, 8 All. (Mass.) 1, 6, 7. And see *Greenwood v. West*, 171 Ala. 463; *Brookshire v. Harp*, 186 Ky. 217, 222; *Watson v. French*, 112 Me. 371; *Nichols v. Luce*, 24 Pick. (Mass.) 102; *Cornell-Andrews Co. v. Boston & P. R. Co.*, 202 Mass. 585; *Hart v. Deering*, 222 Mass. 407; *Palmer v. Palmer*, 150 N. Y. 139; *Crotty v. New River Coal Co.*, 72 W. Va. 68; *Miller v. Skaggs*, 79 W. Va. 645.

joined each other, being numbers five and six in the same street; and that the action was brought to recover compensation for damage done to the plaintiff's house by the disturbance of its foundations. The houses had been originally the property of the same person; and in August, 1847, he demised them both to one Watmough, by separate instruments, for ninety-nine years. Watmough mortgaged them to one Brown, and he assigned his interest in the mortgage to one Halliday, who, under a power contained in the deed of mortgage, sold one of the houses to the plaintiff in July, 1849, and the other house to the defendant in the following month of September. At the time the houses were built, there was no public sewer, but the ground landlord, under the supervision of the Commissioners of Sewers, made a sewer through the public street for the convenience of the tenants; and the defendant, by the consent of the Commissioners, formed a drain in connection with the public sewer through his own house. In making this drain, the damage was occasioned for which the present action was brought.

On the part of the defendant, it was objected that, under this state of circumstances, the action could not be maintained, inasmuch as the plaintiff had not established her right to the support she claimed. The Lord Chief Baron left the case to the jury, who found a verdict for the plaintiff with £25 damages, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him.

Lush moved accordingly.

The court then intimated that the learned counsel might take a rule *nisi* upon the latter point, on payment of costs; but this he declined to do.

Cur. adv. vult.

POLLOCK, C. B. now said — In this case Mr. Lush moved for a rule *nisi* to set aside the verdict found for the plaintiff with £25 damages, and to enter a verdict for the defendant. We are all of opinion that there ought to be no rule. It seems to be clear that, where a number of houses are built upon a plot of ground, all the houses belonging to the same person, being all built together, and each obviously requiring the mutual support of its neighbors for their common protection and security, such right of mutual support equally exists, whether the owner parts first with one house, and then with another, or with two together, the ownership of the latter being afterwards divided, either by sale, mortgage, devise, or by any other means. The right does not depend upon the determination of the fact whether the houses are parted with at one or at separate times. That fact cannot affect the result where the houses are originally built, depending upon each other, and requiring their mutual support. It seems to be purely a matter of common sense, that the possessors are not to be deprived of that mutual support, and that a person in possession of one of the houses shall not be permitted to say to his neighbors, "You are not entitled to the protec-

tion of my house: I will pull it down to the ground, and will let the houses upon each side of it collapse and fall into the ruins." The case of *Pinnington v. Galland*, 9 Ex. 1, which is a recent decision of this court, seems to involve the same principle. That, however, was in respect of a right of way, and not of a right of support. But we are all of opinion that, where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of the houses, as against himself grants such right, and on his own part also reserves the right; and consequently the same mutual dependence of one house upon its neighbors still remains. Upon the point reserved, therefore, there will be no rule. The learned counsel seems also to have objected, that the finding of the jury must have been based upon something in the nature of a compromise, inasmuch as the damages, if any, should have been much greater in amount, and consequently that the verdict requires revision. It appears, however, to us that although there are cases in which such an argument might prevail, the present case does not fall within such principle. In the case of an action on a bill of exchange, to which the defendant pleads only that the bill is forged, and the jury find a verdict for the plaintiff, with damages one farthing, thereby compromising the matter by finding that the bill is not forged, and yet giving the plaintiff nominal damages only, the court would clearly see that the verdict is inconsistent, and that the jury had failed to discharge their duty. That principle does not apply where the damages are large. And, moreover, in this case there was evidence to show that the foundation of the plaintiff's house was not very secure, and consequently there was some color for the view which the jury took of the amount of damage occasioned by the defendant's act. The court are of opinion that the defendant is not entitled to a rule for a new trial upon this point, except upon payment of costs; and the learned counsel has declined to accept the rule upon that condition. *Rule refused.*¹

PYER v. CARTER

1 H. & N. 916. 1857.

THE declaration stated, that before and at the time of committing the grievances, &c., the plaintiff was lawfully possessed of a messuage and premises with the appurtenances, situate in St. Anne Street, Liverpool, and by reason thereof was entitled to a drain or

¹ See *Goldschmid v. Starring*, 5 Mackey (D. C.) 582; *Morrison v. King*, 62 Ill. 30; *Teachout v. Duffus*, 141 Iowa 466; *Adams v. Marshall*, 138 Mass. 228; *Curtiss v. Ayrault*, 47 N. Y. 73; *Rogers v. Sinsheimer*, 50 N. Y. 646.

sewer, and passage for water, leading from the said messuage and premises, in, through, and under certain adjoining land at Liverpool aforesaid, through which the rain and water from the plaintiff's said messuage and premises of right had flowed, and still of right ought to flow, away from the plaintiff's said messuage and premises: yet the defendant wrongfully stopped up the said drain and sewer, whereby divers large quantities of rain and water which of right ought to have flowed, and otherwise would have flowed, through the same drain, sewer and passage for water, were prevented from flowing from the plaintiff's said messuage and premises, and flooded, soaked into and injured the same, &c.

Pleas. — First: Not guilty. Secondly: that the plaintiff was not entitled to the said drain, sewer, and passage for water; nor did the rain and water from the plaintiff's said messuage and premises of right flow, nor ought to flow, away from the plaintiff's said messuage and premises through the said drain, sewer and passage for water as alleged. — Issues thereon.

At the trial, before *Bramwell*, B., at the last Lancashire Summer Assizes, it appeared that the plaintiff and defendant were owners of adjoining houses situate in St. Anne Street, Liverpool. These houses had been formerly one house, and had belonged to a person of the name of Williams, who converted them into two houses. In July, 1853, Williams conveyed the defendant's house to him in fee. This conveyance contained no reservation of any easement. In September, 1853, Williams conveyed the plaintiff's house to him in fee. At the time of these conveyances a drain or sewer ran under the plaintiff's house and thence under the defendant's house and discharged itself into the common sewer in St. Anne Street. Water from the eaves of the defendant's house fell on the plaintiff's house, and from thence flowed down a spout into the drain on the plaintiff's premises, and so into the common sewer. The defendant blocked up the drain where it entered his house, and in consequence, whenever it rained, the plaintiff's house was flooded. The defendant stated that he was not aware of the drain at the time of the conveyance to him. It was proved that the plaintiff might construct a drain directly from his own house into the common sewer at a cost of about six pounds.

It was submitted on the part of the defendant, that the plaintiff had no right to the use of the drain under the defendant's house. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Cur. adv. vult.

The judgment of the court was now delivered by

WATSON, B. This was an action for stopping a drain that ran under both the plaintiff's and defendant's houses, taking the water from both. The cause was tried at Liverpool, before Baron *Bram-*

well, when a verdict was entered for the plaintiff, and a motion was made to enter a verdict for defendant in pursuance of leave reserved at the trial.

The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were converted into two houses by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that conveyance the plaintiff took a conveyance of *his* house. At the time of the respective conveyances the drain ran under the plaintiff's house and then under the defendant's house, and discharged itself into the common sewer. Water from the eaves of the *defendant's* house fell on the *plaintiff's* house, and then ran into the drain on plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was proved that, by the expenditure of six pounds, the plaintiff might stop the drain and drain directly from his own land into the common sewer. It was not proved that the defendant, at the time of his purchase, knew of the position of the drains.

Under these circumstances we are of opinion, upon reason and upon authority, that the *plaintiff* is entitled to our judgment. We think that the owners of the plaintiff's house are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with reason, that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. If that were not so, the inconveniences and nuisances in towns would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole. The authorities are strong on this subject. In *Nicholas v. Chamberlain*, Cro. Jac. 121, it was held by all the court that, "if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to his house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, *because it is necessary and quasi appendant thereto*, and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So if a lessee for years of a house and land erect a conduit upon the land, and after the term *the lessor occupies them together for a time*, and afterwards sells the house with the appurtenances, to one, and the land to another, the vendee shall have the conduit

and the pipes, and liberty to amend them." *Shury v. Pigott*, Popham, 166; s. c. 3 Bulst. 339; and the case of *Coppy v. I. de B.*, 11 Hen. 7, 25, pl. 6. support this view of the case, that where a gutter exists at the time of the unity of seisin of adjoining houses it remains when they are aliened by separate conveyances, as an easement of necessity.

It was contended, on the part of the defendant, that this pipe was not of necessity, as the plaintiff might have obtained another outlet for the drainage of his house at the expense of six pounds. We think that the amount to be expended in the alteration of the drainage, or in the constructing a new system of drainage, is not to be taken into consideration, for the meaning of the word "necessity" in the cases above cited, and in *Pinnington v. Galland*, 9 Exch. 1, is to be understood the necessity at the time of the conveyance, and as matters then stood without alteration; and whether or not at the time of the conveyance there was any other outlet for the drainage water, and matters as they then stood, must be looked at for the necessity of the drainage.

It was urged that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or ought to have known that some drainage then existed, and if he had inquired he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. Gale (*Gale on Easements*, p. 53, 2d ed.) that by "*apparent signs*" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase; and therefore we think the rule must be discharged.

Rule discharged.

SUFFIELD v. BROWN

4 DeG. J. & S. 185. 1863.

THIS was an appeal by the defendant from a decree of the Master of the Rolls, whereby his Honor granted without costs a perpetual injunction restraining the appellant from preventing or interfering with the full use and enjoyment of the dock, hereinafter referred to, by the plaintiffs in the manner the same had theretofore been used, by allowing the bowsprit of any vessel in the plaintiffs' dock to overlie or overhang a certain specified portion, to be marked out

by metes and bounds, of the appellant's wharf, also hereinafter referred to, with liberty to apply.

The plaintiffs were respectively the owners in fee and lessees of a dock situate on the Thames at Bermondsey, and used for repairing ships, principally sailing vessels.

The appellant was the owner in fee of a strip of land and coal wharf adjoining the dock, on which he had begun to build a warehouse.

The plaintiffs filed the bill in this suit for an injunction to restrain such building, on the ground that when their dock was occupied by a vessel of large size, her bowsprit must project over the boundary fence of the dock, across the appellant's premises, which it could not do if the appellant's building should be erected, and that they had a right to restrain such building, because it would deprive them of an easement or privilege which they were entitled to use or exercise over the land of the appellant.

The plaintiffs put their case upon possession and enjoyment of the privilege claimed by them of sufficient duration to create a legal title. The Master of the Rolls decided, and in the judgment of the Lord Chancellor (from whose judgment the present statement of the facts is in the main taken) correctly, that the plaintiffs had not proved a possession or enjoyment sufficient to create a legal title to an easement; but his Honor nevertheless granted an injunction in the terms above stated.

Shortly stated, the facts of the case were as follows:—

From the year 1841 until the month of June, 1845, a person named Knox was the owner in fee, and also the occupier, both of the dock and of the adjoining strip of land and coal wharf; and the evidence proved that during such period whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across the adjoining strip of land.

In the month of June, 1845, the two properties, the dock and the strip of land and coal wharf, were put up for sale by Knox by public auction.

In the description given in the particulars of sale, it was stated that the dock was capable of holding two vessels of large size, and that at low water several vessels, or a steamer of the largest class, could safely lie on "the ways" for repairs.

The strip of land described and sold as a "freehold coal wharf" was stated to be capable of being rendered worth a very large rental by a comparatively small outlay. It was represented, therefore, as an improvable property, and nothing was stated to show that the dock or its owners either then had, or were intended to have, any right or privilege over the adjoining premises.

At the auction, the strip of land and coal wharf were sold to one Gibson, and by the conveyance, which was dated in July, 1845, the vendor (who, at the execution of the deeds, still remained owner

of the dock), conveyed the strip of land and coal wharf to the purchaser, under whom the appellant claimed, in the most unqualified manner in fee simple, "together with all privileges, easements and appurtenances to the premises belonging, and all the estate, right, title, interest, property, claim and demand whatsoever, both at law and in equity, of the vendor, in, to, or out of the same hereditaments and premises, and every part thereof." The dock was afterwards sold and conveyed to other persons, under whom the plaintiffs claimed.

At the conclusion of the arguments, the Lord Chancellor reserved his judgment.

THE LORD CHANCELLOR [LORD WESTBURY], after stating the nature and the facts of the case to the effect of the statement hereinbefore contained, proceeded as follows:—

The conveyance of the coal wharf, therefore, is the grant of a person who was at that time absolute owner of the dock, in respect of the ownership of which the present right is now claimed by his grantees against the coal wharf, and it is very difficult to understand how any interest, right or claim in, over or upon any part of the coal wharf could remain in the grantor, or be granted by him to a third person, consistently with the prior, absolute and unqualified grant that was so made of the coal wharf premises to the purchaser.

Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the subservient property.

It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances.

But this view of the case is not that taken by his Honor the Master of the Rolls.

In the note which has been furnished me of his Honor's judgment, his Honor is represented as saying:—"The ground on which I think he (the defendant) cannot contest this right in the plaintiff is because I think that such projection of the bowsprit from the vessel in the dock is essential to the full and complete enjoyment of the dock as it stood at the time when he, or rather Gibson under whom he claims, purchased the wharf, and that Gibson and he had distinct notice of this fact, not merely from the description contained in the particulars of sale under which he bought, but also because

the fact was patent and obvious to any one, on the ground that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the wharf which I have pointed out." And again, "If, therefore, it be true that the dock can still be used, it is equally true that it cannot be used exactly as it has been heretofore, and my opinion is that this projection of the bowsprit is necessary for the due enjoyment of the dock in the ordinary sense of that term."

The effect of this is, that if I purchase from the owner of two adjoining freehold tenements the fee simple of one of those tenements and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine; I believe it to be of very recent introduction; and it is in my judgment unsupported by any reason or principle, when applied to grants for valuable consideration.

That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement is wholly immaterial, if he buys the fee simple of his tenement, and has it conveyed to him without any reservation. To limit the vendor's contract and deed of conveyance by the vendor's previous mode of using the property sold and conveyed is inconsistent with the first principles of law, as to the effect of sales and conveyances.

Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it on which he has been for years in the habit of throwing out the cinders, dust and refuse of his workshops which would be an easement necessary (in the sense in which that word is used by the Master of the Rolls) for the full enjoyment of the manufactory; and suppose that I, being desirous of extending my garden, purchase this piece of land and have it conveyed to me in fee simple; and the owner of the manufactory afterwards sells the manufactory to another person; am I to hold my piece of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of the judgment before me, I certainly am so subject; for the case falls strictly within the rules laid down by his Honor, and it reduces them to an absurd conclusion.

The first introduction of this extraordinary doctrine appears to have been made in the following manner:—

A learned and ingenious author, the late Mr. Gale, published, in the year 1839, a work of great merit on this subject of easements, in which he derived from the doctrine of the French Code Civil¹

¹ See French Civil Code, Arts. 688-694; 65 U. P. L. Rev. 77.

certain rules with which he conceived that the law of England agreed, and inasmuch as these conclusions have been cited with approbation in some recent cases at common law, and as they form the principal support of the plaintiff's argument, it is right to state and examine them.

Mr. Gale, in the opening of his 4th chapter (page 81, ed. 3), says: "The implication of the grant of an easement may arise in two ways: 1st, upon the severance of an heritage by its owner into two or more parts; and 2dly, by prescription. Upon the severance of an heritage a grant will be implied, 1st, of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have had no legal existence as easements; and, 2dly, of all those easements without which the enjoyment of the severed portions could not be had at all."

It will be observed that the learned author is not here speaking of easements which are already legally existing before the unity of possession, but of those which he supposes to arise for the first time by implication from the grant.

If nothing more be intended by this passage than to state, that on the grant by the owner of an entire heritage of part of that heritage, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted, there can be little doubt of its correctness; but it seems clear that the learned writer uses the word "grant" in the sense of reservation or mutual grant, and intends to state, that where the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous and apparent or necessary easements out of or upon the thing granted as have been used by the owner for the benefit of the unsold part of the heritage during the unity of possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the *quasi dominant* or *quasi servient* tenement.

But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor.

Consider the easements as if they were rights, members or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner.

Many rules of law are derived from fictions, and the rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations which accompany such portions when divided among them, or even, as it is used in French law, when aliened to strangers.

But this comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership.

And this observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer v. Carter*, 1 H. & N. 916, one of the two cases on which the Master of the Rolls relies.

In *Pyer v. Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely, and without reservation, and he subsequently sold and conveyed the remaining house to another person. It appeared that the second house was drained by a drain that ran under the foundation of the house first sold; and it was held that the second purchaser was entitled to the ownership of the drain, that is, to a right over the freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house "such as it is." But with great respect, the expression is erroneous, and shows the mistaken view of the matter; for in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house not "such as it is," but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the court that the easement was "apparent," because the purchaser might have found it out by inquiry; but the previous question is whether he was under any obligation to make inquiry, or would be affected by the result of it; which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case of *Pyer v. Carter* the true conclusion was, that as between the purchaser and the vendor the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority.

But to the earlier cases cited by the court in *Pyer v. Carter* as authorities for its decision there can be no objection.

In *Nicholas v. Chamberlain*, Cro. Jac. 121, it was decided that if the owner of a house, being also owner of the land surrounding it, make a conduit through part of the land to the house, and then sells the house with its appurtenances, the right to the conduit passes; that is to say, the court held that the conduit was a thing appertaining to the house, and as such passed under the conveyance; and in the same case it was also decided, that if the owner sell the land, reserving the house, the right to the conduit is reserved, — a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances.

To this case and to the case in the Year Book of the 11th of Henry VII., 25 Pl. 6, *Coppy v. J. de B.*, or the case of *Sury v. Pigott*, Palmer, 444, there can be no objection; but they do not give any support to the decision in *Pyer v. Carter*.

The other case relied on by his Honor, namely, *Hinchcliffe v. The Earl of Kinnoul*, 5 Bing. N. C. 1, is of a different character, and does not apply to the question of easements reserved by implication or the grant of the *quasi servient* tenement. In that case, there being two adjoining houses, belonging to the same lessor, it appeared that the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house; and it was held that a demise by the owner of both houses, of the first house with its appurtenances, carried with it the right to use the coal shoot, and also a right of way to the coal shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal shoot, — a decision which rests upon the ordinary principle of law, that if I grant a tenement for valuable consideration I also grant a right of way to it through my land, if such way be absolutely necessary for the enjoyment of the thing granted.

This case might have had some application to the present if the dock had been the property first sold, and had been conveyed with all privileges, easements, rights, and appurtenances as then used and enjoyed by the vendor, he being still the owner of the adjoining strip of land and coal wharf; but it is plain that no easements can arise by the necessary operation of a grant, unless it be in the power of the grantor to give such easements.

It is true that there may be two tenements, as, for example, two adjoining houses, so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbor; in which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he retains, that support from the house sold, which is at the same time afforded

in return by the former to the latter tenement (which was the case of *Richards v. Rose*, 9 Exch. 218); but where the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former tenement, it is severed, and either passed or extinguished by the grant.

It must always be recollected that I have been speaking throughout of cases where (as in the present case) the easement claimed had no legal existence anterior to the unity of possession, but is claimed as arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both, — which is in my opinion an ingenious but fanciful theory, which is, as to part, not required by, and is as to the other part wholly inconsistent with, the plain and simple principles of English law that regulate the effect and operation of grants of real property.

There is in my judgment no possible legal ground for holding that the owner of the dock retained or had in respect of that tenement any right or easement over the adjoining tenement of the strip of land and coal wharf after the sale and alienation of the latter in the year 1845. I must entirely dissent from the doctrine on which his Honor's decree is founded, that the purchaser and grantee of the coal wharf must have known, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, and that he must be considered, therefore, to have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut down and reduced accordingly. I feel bound, with great respect, to say that in my judgment such is not the law.

But if any part of this theory were consistent with law, it would not support the decree appealed from, for the easement claimed by the plaintiff is not "continuous," for that means something the use of which is constant and uninterrupted; neither is it "an apparent easement," for except when a ship is actually in the dock with her bowsprit projecting beyond its limits, there is no sign of its existence; neither is it a "necessary easement," for that means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all.

But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made.

Therefore I must reverse the decree of the Master of the Rolls, and dissolve the injunction he has granted, and dismiss the plaintiff's bill, with costs.

UNION LIGHTERAGE CO. v. LONDON GRAVING
DOCK CO.

[1902] 2 Ch. 557. 1902.

APPEAL from the decision of Cozens-Hardy, J., [1901] 2 Ch. 300.

In 1860 Henry Green was the owner in fee simple of some river-side property at Blackwell. The western part was used as a wharf and shipbuilding yard, and was in the occupation of Messrs. Freeman as tenants. The eastern part was in the occupation of Green himself. In the same year he employed contractors to construct a graving dock on his own premises. It was constructed with timber sides, the underground supports or ties being placed on the eastern side of the boundary fence dividing the two portions of the property. Signs of weakness soon appeared, and, in order to make the dock secure, Green, in or about 1861, under some arrangement with his tenants, Messrs. Freeman, carried rods or ties through the boundary fence under the wharf to a distance of about 15 ft. 6 in., piles being placed there, and the rods or ties being fastened to the piles by nuts. The rods or ties were not visible under the wharf, nor, except to the extent which will be mentioned presently, were the piles or the nuts visible.

In 1877, Green having died, and both the properties being in hand, the devisees under his will conveyed the wharf premises to the plaintiffs, who carried on business there up to the commencement of the present action. The conveyance was in the ordinary form, and contained no express reservation of any right of support to the dock. In 1886 Green's devisees sold the dock premises to a company, which subsequently sold those premises to the defendants, who carried on business there up to the commencement of the action. This conveyance also was in common form, and was silent as to support. In 1892 the defendants concreted the bottom and a small part of the side of their dock; but with this exception the timber remained as before. In 1900 the plaintiffs, in the course of excavations with a view to improving their property, came across a number of rods and ties, which were those which had been placed there in 1861.

The question in the action was whether the defendants were entitled, as against the plaintiffs, to have their dock supported by means of the rods and ties.

The result of the evidence was thus stated by Cozens-Hardy, J., in his judgment:—

“Evidence has been adduced which satisfies me on several points. (1.) For a timber dock of this nature it was reasonably necessary to have underground rods and ties extending beyond the division fence between the two properties. This was proved by actual ex-

perience in 1860, and Mr. Jefferey, whose testimony was in no way shaken, states that the proper distance for safety, though it might vary slightly having regard to the nature of the soil, is for a dock of this depth thirty-three feet from the side, and this is about the distance adopted in 1861. (2.) If instead of a timber dock a concrete wall had been placed on the western side of the dock, it would not have been necessary to go beyond the boundary fence. (3.) The plaintiffs, when they purchased in 1877, in fact had no knowledge of the existence of the rods or ties under their land, and they were not aware of their existence until 1900. In saying this I refer to the directors and managers of the plaintiff company. (4.) There are now visible on the western side of the camp-sheathing, (See note [1901] 2 Ch. at p. 302), which holds up the side of the wharf, and a few inches above the slip, two nuts on the outside of piles. These are nuts and piles placed there in 1861. These nuts are not always visible, and are not of such a nature as to attract attention. In fact, the directors and the present manager had not noticed them until 1900. (5.) Although a skilled expert informed of the nature of the dock might have concluded that these nuts had to do with the support of the dock, no ordinary person conversant with riverside property would necessarily have arrived at this conclusion, for they might very probably have served to support the camp-sheathing and the wharf behind it. (6.) If the plaintiffs remove the ties it is probable that the dock side will give way."

The accuracy of this statement was not disputed.

COZENS-HARDY, J. held that when the wharf was conveyed to the plaintiffs there was no implied reservation of a right to support to the dock; that the support had been enjoyed *clam*, and that therefore no easement had been acquired by enjoyment; and that the plaintiffs were entitled to remove the rods and ties, although the result might be to cause the defendant's dock to collapse.

The defendants appealed.

VAUGHAN WILLIAMS, L. J. read the following judgment:¹

The question is, whether there has been gained, in respect of the dry dock of the defendants, the right to retain in or under the land of the plaintiffs certain rods or ties for the purpose of supporting or upholding the dry dock. The defendants claim the right in two ways: first, by way of implied reservation; secondly, by way of prescriptive easement. It is necessary, in order to judge of these claims, to state the history of the case. [His Lordship stated the facts, and continued:—]

I will now deal with the two legal questions in succession. First, was there, under these circumstances, any reservation by Green of the right of support by these tie-rods? Secondly, have Green or his

¹ Those portions of the opinion which deal with the question of prescription are omitted.

successors, by enjoyment since 1877, acquired, by prescription or presumed lost grant, any right to this support? Now, as to the question of reservation, *Wheeldon v. Burrows*, 12 Ch. D. 31, puts beyond doubt the general rule, that, if a grantor upon a conveyance of part of his property intends to reserve any right over the tenement granted, he must do so by an express reservation in the grant. So far *Wheeldon v. Burrows*, 12 Ch. D. 31, is a mere affirmation of the law as laid down by Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 185, 194, where he says: "But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor. Consider the easements as if they were rights, members, or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner." But both Thesiger, L. J., in *Wheeldon v. Burrows*, 12 Ch. D. 31, and Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 185, 194, recognize that there are some exceptions to this general rule. One exception is the case of necessity, of which a way of necessity is the most familiar instance. Another case of exception is the case of reciprocity, in which houses or other buildings are so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbor. This exception is recognized by Lord Westbury, 4 D. J. & S. 198, and by Thesiger, L. J., in *Wheeldon v. Burrows*, 12 Ch. D. 31, the judgment of Pollock, C. B., in *Richards v. Rose*, 9 Ex. 218, being generally the authority quoted for this exception of reciprocal or mutual easements. A third exception is where that which is claimed to be reserved is not an incorporeal easement, but part and parcel of a house or other building belonging to the conveying party, but not included in the conveyance. This exception is clearly recognized by James, L. J., in a short supplementary judgment which he delivered in *Wheeldon v. Burrows*, 12 Ch. D. 31. He said: "I only want to say something in addition, that in the case of *Nicholas v. Chamberlain*, Cro. Jac. 121, the Court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house." Thesiger, L. J., also recognizes the same exception, but put *Nicholas v. Chamberlain*, Cro. Jac.

121, as an instance of an easement of necessity. Lord Westbury seems also to recognize this exception, for, speaking of *Nicholas v. Chamberlain*, Cro. Jac. 121, he said, (4 D. J. & S. 197): it is "a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances." The present case is on the border line, but there is a great deal to be said in favor of the contention of the defendants, that these tie-rods fastened to the piles constitute a corporeal part of the dry dock, which was reserved, and, being essential to the maintenance of the dry dock, as it stood before and at the time of the conveyance, fall within Thesiger, L. J.'s view of this, which I have called the third exception, by being easements of necessity. On the whole, I think that the defendants are entitled to keep these tie-rods in the position in which they were originally placed, and always have been maintained, for the necessary purpose of the maintenance of the dry dock as built with its wooden sides. The tie-rods, in my opinion, are a corporeal part of the dry dock, just like the conduit or the cellar, or the flue mentioned by James, L. J. The tie-rods were, I think, reserved with the dry dock as appurtenances thereof, as Lord Westbury expresses it.

I have only to add that I do not assert that the authorities uniformly recognize the exceptions which I have specified to the general rule laid down by Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 185, 194, namely, the rule that it seems more reasonable and just to hold that, if the grantor intends to reserve any right over property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by a fiction of an implied reservation. For instance, there is this statement made by Lord Chelmsford, L. C., in *Crossley & Sons v. Lightowler*, L. R. 2 Ch. 478, 486: "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it." But against this dictum one has to put all those cases in which a reservation is implied for a right of support by way of reservation in favor of the grantor. These cases will be found set out in the judgment of Wood, V.-C., in the note to *Taylor v. Shafto*, [1867] 8 B. & S. 228, 252, which show generally that the implication in favor of an existing support is easily made on the ground of necessity. It cannot, as it seems to me, be said that the result of the judgments in either *Wheeldon v. Burrows*, 12 Ch. D. 31, or *Suffield v. Brown*, 4 D. J. & S. 185, is that it is impossible to presume a reservation from the state of things existing at the moment of severance of ownership of adjoining houses originally belonging to one owner. *Richards v. Rose*, 9 Ex. 218, was the case of two houses originally built together and belonging

to the same owner, and there the Court presumed that, upon severance of ownership, there was a grant and reservation of a reciprocal right of support. It is, of course, true that the reciprocity is an important consideration in the inference, but the inference is not from user; it is based upon the fact of the state of things existing at the moment of severance. It may be that the presumption will more readily arise where there is reciprocity than where there is no reciprocity, but the principle is the same in either case. In each case there is an exception from the rule that a man shall not derogate from his own express grant. The grantor is allowed by implication to derogate from his own express grant. Why? Because of the state of things at the moment of severance.

ROMER, L. J. read the following judgment: In my opinion this appeal fails. In the first place, I think that when the vendors, through whom the defendants claim, conveyed the plaintiffs' land to the plaintiffs, no reservation can be implied in favor of the vendors of a right of support in respect of the defendants' dock. When the conveyance is looked at, it appears to me that the ties supporting the dock, so far as they are on the plaintiffs' land, cannot be treated as part of the dock, and as not being conveyed. The land conveyed is clearly described, and, in my opinion, must cover the place occupied by the ties. Nor is this one of those cases of difficulty, referred to in *Wheeldon v. Burrows*, 12 Ch. D. 31, and other authorities, where at the date of conveyance reciprocal rights as between the property conveyed on the one hand and the property retained by the vendors on the other might be inferred. That being so, then, following *Wheeldon v. Burrows*, 12 Ch. D. 31, by which we are bound, it is clear that a reservation of a right of support in the present case could only be implied if it were one of necessity. Now, all I need say on this part of the case is that the facts do not lead me to the conclusion that there was any such necessity proved, or to be inferred, as would require, or would justify the Court in holding, that the reservation should be implied.

STIRLING, L. J. read his judgment as follows: The first point decided by Cozens-Hardy, J., was that, on the conveyance to the plaintiffs of the wharf in 1877, there was no implied reservation to the vendor of the easement now claimed by the defendants.

On this point the governing authority is *Wheeldon v. Burrows*, 12 Ch. D. 31, decided by James, Baggallay, and Thesiger, L. JJ., by the last of whom the judgment of the Court was delivered. In it two rules are laid down in the following terms (12 Ch. D. 49): "The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are

at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second . . . is, that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity." After reviewing various cases, the learned judge said (12 Ch. D. 58): "These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favor of the grantor of land."

The appellants did not dispute that there is no express reservation in the conveyance to the plaintiffs, but they contended that the easement claimed by the defendants is an "easement of necessity" within the recognized exception to the second rule. Now, in the passages cited the expressions "ways of necessity" and "easements of necessity" are used in contrast with the other expressions, "easements which are necessary to the reasonable enjoyment of the property granted" and "easements . . . necessary to the reasonable enjoyment of the property conveyed," and the word "necessity" in the former expressions has plainly a narrower meaning than the word "necessary" in the latter.

In my opinion an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property. In *Wheeldon v. Burrows*, 12 Ch. D. 31, the lights which were the subject of decision were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of it. So here it may be that the tie-rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendants' dock in its present condition; but the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them. Some other exceptions to the general rule are mentioned in *Wheeldon v. Burrows*, 12 Ch. D. 31, and in particular reciprocal easements, but it was not contended, and it does not appear to me that this case falls within any of them. Nor do I think that the tie-rods here form part of the corporeal structure of the dock which can be held not to have passed by the conveyance of the adjoining property.¹

¹ See *Wheeldon v. Burrows*, L. R. 12 Ch. D. 31.

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CARBREY v. WILLIS

7 All. (Mass.) 364. 1863.

CONTRACT to recover damages for the breach of the covenants of warranty and against encumbrances in a deed of land on Atkinson Street, in Boston, bounded in part as follows: "Southerly on land now or late of Benjamin Gould, there measuring sixteen feet and six inches; westerly again on the same, there measuring sixteen feet; and southerly on land now or late of the heirs of Cowell, there measuring forty-eight feet, more or less, to said Atkinson Street, or however otherwise bounded or described." The declaration alleged that the premises conveyed were subject to a right of drainage across the same, and also to the right to have the eaves on the estate on the southerly side thereof overhang said land, and the water drip therefrom.

At the trial in the Superior Court, before Ames, J., the execution of the deed by the defendant, which was dated May 1, 1848, was admitted. It appeared in evidence that in 1812, and for many years before that time, the granted premises, and also an estate on High Street, in favor of which the alleged right of drainage was claimed, belonged to George Blanchard; and that in 1812 Blanchard conveyed to Rebecca Richardson the estate described in said deed, by a deed of mortgage in the common form, with general covenants of warranty and freedom from encumbrance, to secure the payment of \$5000 in two years with interest. The title under this mortgage and also the equity of redemption, which was taken on execution, became vested in the defendant as early as 1821. The title to the estate on High Street passed from Blanchard in 1815, and is now held by devisees of William Phillips, who acquired the title thereto in 1823.

The plaintiff introduced evidence tending to show that there was no trouble with the drain from the estate on High Street until 1857, when it became choked up, and flooded the cellar of the house from which it led, and a mason was employed to make examinations, and it was found that it passed through the plaintiff's land; and that the house upon the estate on High Street was an old house prior to the year 1812. The plaintiff testified that he had no knowledge of the existence of the drain until it was opened by the mason. There was no evidence when or under what circumstances the drain was originally constructed, except that the mason testified that it appeared as if it was built when the house drained by it was built. There was some conflict of testimony as to the practicability of draining from the cellar of the High Street estate into the High Street sewer.

"The judge ruled that, there being no evidence as to the precise time when the drain was constructed, and it being assumed that it was an ancient one, the burden was upon the plaintiff to show that the owners of the High Street estate had acquired a right to use it,

and that, so long as both estates were owned in the same right by the same person, the use of the drain had nothing of the nature or character of an easement; that, after the ownership was severed and the two estates had passed into different hands, the fact that the High Street estate continued to be drained across the plaintiff's estate, without any evidence that the plaintiff or those under whom he claims had any knowledge or notice whatsoever of the fact, would not amount to such an adverse use or such a claim of right as by mere use and lapse of time to create a right of easement, and that such use, not being open and notorious, would not establish the right, unless shown expressly to have come to the knowledge of the owners of the plaintiff's estate.

"The judge also ruled that, although a drain attached to and used by the High Street estate would generally be held to be appurtenant thereto and to pass by any deed or conveyance thereof, independently of any prescriptive title or right acquired by adverse use, yet under the circumstances of this case, the drain being assumed by both parties to have been in use previously to the year 1812, and the owner at that time, Blanchard, having conveyed by mortgage the alleged servient estate to Richardson, with general covenants of warranty and freedom from encumbrances, the defendant, under the title deeds put in by him, making his title in part under the conveyance to said Richardson, held his estate in 1821 and afterwards relieved of this encumbrance; and that the owners of the High Street estate, claiming under said Blanchard, are estopped and barred, by the previous deed from said Blanchard of the other estate, from claiming the drain in controversy as appurtenant to their estate."

A verdict was rendered for the defendant, by the direction of the judge, and the facts and evidence were reported for the revision of this court.

HOAR, J. The first ruling made by the judge who presided at the trial was entirely correct. While both estates were owned by Blanchard, no easement could be created by any use of the drain for the benefit of one of them. And after the ownership was severed, the continuance of the drain would have no tendency to prove the acquisition of an easement by adverse enjoyment, because the use was not open or visible, or known to the owners of the estate upon which it would be imposed.

In the next place, it is clear that the conveyance by the mortgage to Rebecca Richardson in 1812, with full covenants of warranty, would estop the grantor and those claiming under a title subsequently derived from him, from claiming any interest in the mortgaged premises. When the mortgage was foreclosed or merged in the equity of redemption, the title of the mortgagee became absolute and indefeasible to all the premises included in the mortgage deed at the time of its execution.

The only question, then, which arises on this part of the case is,

whether anything was excepted from the grant to Richardson, as forming a part of the High Street estate which was retained by the grantor. The whole doctrine on this subject was reviewed and carefully stated in the case of *Johnson v. Jordan*, 2 Met. 234. The court in that case intimate the opinion "that if a man, owning two tenements, has built a house on one, and annexed thereto a drain passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee; whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms, when it naturally would be if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the encumbrance." The grants were in that case simultaneous. But where, as in the case at bar, the grant of the lower estate precedes that of the other, we think the true rule of construction is this: that no easement can be taken as reserved by implication, unless it is *de facto* annexed and in use at the time of the grant, and is necessary to the enjoyment of the estate which the grantor retains. And this necessity cannot be deemed to exist, if a similar privilege can be secured by reasonable trouble and expense.

The rule in respect to easements which pass by implication has been held with some strictness in this Commonwealth, even in the case where a grantee claims them as against his grantor, or where the question arises between grantees under conveyances made at the same time, or in cases of partition. Thus in *Grant v. Chase*, 17 Mass. 443, it was said that easements which are not named would not pass by a grant, "unless they were either parcel of the premises that were expressly conveyed, or necessarily annexed and appendant to them." In *Nichols v. Luce*, 24 Pick. 102, it was held that "convenience, even great convenience, is not sufficient" to make a right of way pass as appurtenant. To the same effect is *Gayetty v. Bethune*, 14 Mass. 49; and a similar conclusion is reached upon full discussion, by Mr. Justice Fletcher, in *Thayer v. Payne*, 2 Cush. 327.

In some recent cases in England a different doctrine seems to have prevailed; and even in the case of a grant of a part of an estate, an easement has been held to be reserved to the grantor as parcel of the remainder, without an express reservation, if it were *de facto* used in connection with it at the time of the grant, and were necessary to its enjoyment in the condition in which the estate then was. *Pyer v. Carter*, 1 Hurlst. & Norm. 916; *Ewart v. Cochrane*, 7 Jur. N. S. 925; *Hall v. Lund*, Law Journ. Rep. May, 1863, page 113. In *Pyer v. Carter* it was held that it would make no difference in the application of the principle, if a new drain could be constructed on the

plaintiff's own land at a trifling expense. The terms of the deed are not given in the report of the case, and the decision may perhaps be supported on the ground that the conveyance was of part of a house, having obvious existing relations to and dependencies upon the other part of the building. Thus it is a familiar principle that in a grant of a messuage, a farm, a manor, or a mill, many things will pass which have been used with the principal thing, as parcel of the granted premises, which would not pass under the grant of a piece of land by metes and bounds. In such cases it is only a question of the construction of terms of description.

But where there is a grant of land by metes and bounds, without express reservation, and with full covenants of warranty against encumbrances, we think there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. Where the easement is only one of existing use and great convenience, but for which a substitute can be furnished by reasonable labor and expense, the grantor may certainly cut himself off from it by his deed, if such is the intention of the parties. And it is difficult to see how such an intention could be more clearly and distinctly intimated than by such a deed and warranty.

The presiding judge ruled, as a matter of law, that no right of drainage was reserved under the deed to Richardson in 1812, and we have some doubt whether the evidence reported would have supported a verdict to the contrary. But as the case must go to a new trial upon another ground, and there was some evidence of the necessity of the drain, and the nature and extent of the necessity do not appear to have been distinctly presented as a subject of ruling by the court, it will be proper that it should be submitted to the jury under suitable instructions upon this point.¹

BROWN v. ALABASTER

37 Ch. D. 490. 1887.

By a lease, dated the 5th of October, 1877, a plot or piece of building land at the corner of Augusta Road and Park Road, at Moseley, Worcestershire, and indicated on a plan in the margin of the lease,

¹ And see *Walker v. Clifford*, 128 Ala. 67; *Preble v. Reed*, 17 Maine 169, 175; *Burns v. Gallagher*, 62 Md. 462; *Brown v. Fuller*, 165 Mich. 162; *Dabney v. Child*, 95 Miss. 585; *Burr v. Mills*, 21 Wend. (N. Y.) 290; *Wells v. Garbutt*, 132 N. Y. 430; *Crosland v. Rogers*, 32 S. C. 130; *Howley v. Chaffee*, 88 Vt. 468; *Shaver v. Edgell*, 48 W. Va. 502, 508; *Attrill v. Platt*, 10 Can. Sup. Ct. 425.

But compare *Cheda v. Bodkin*, 173 Cal. 7, 14; *Znamaneck v. Jelinek*, 69 Neb. 110; *Dunklee v. Wilton R. Co.*, 24 N. H. 489; *Tooth v. Bryce*, 50 N. J. Eq. 589; *Taylor v. Wright*, 76 N. J. Eq. 121; *Lampman v. Milks*, 21 N. Y. 505; *Seibert v. Levan*, 8 Pa. 383; *Sharpe v. Scheible*, 162 Pa. 341; *Harwood v. Benton*, 32 Vt. 724; *Miller v. Skaggs*, 79 W. Va. 645, 648.

was demised by the lessors to William Letts, without any general words, for the term of ninety-nine years at the rent thereby reserved, a right being granted to Letts of erecting a party-wall on the north-east boundary of the land.

By another lease of the same date a larger plot or piece of building land immediately adjoining, and indicated on a plan in the margin of the lease, was demised by the same lessors to Letts, "together with all ways, rights, easements, and appurtenances belonging thereto," for the term of ninety-nine years at the rent thereby reserved, a right being granted to Letts of erecting a party-wall on the north-east boundary of the land.

Shortly after the date of the leases Letts built a boundary or party-wall along the north-east side of both plots, and on part of the first plot he built a house called "Normanhurst." The second or larger plot he divided into two, and on part of the half plot next "Normanhurst" built a house called "Cottisbrook," and on part of the other half plot a house called "Westbourne." All three houses fronted towards, and had entrances into, Park Road, the ground behind each being enclosed and laid out as a garden.

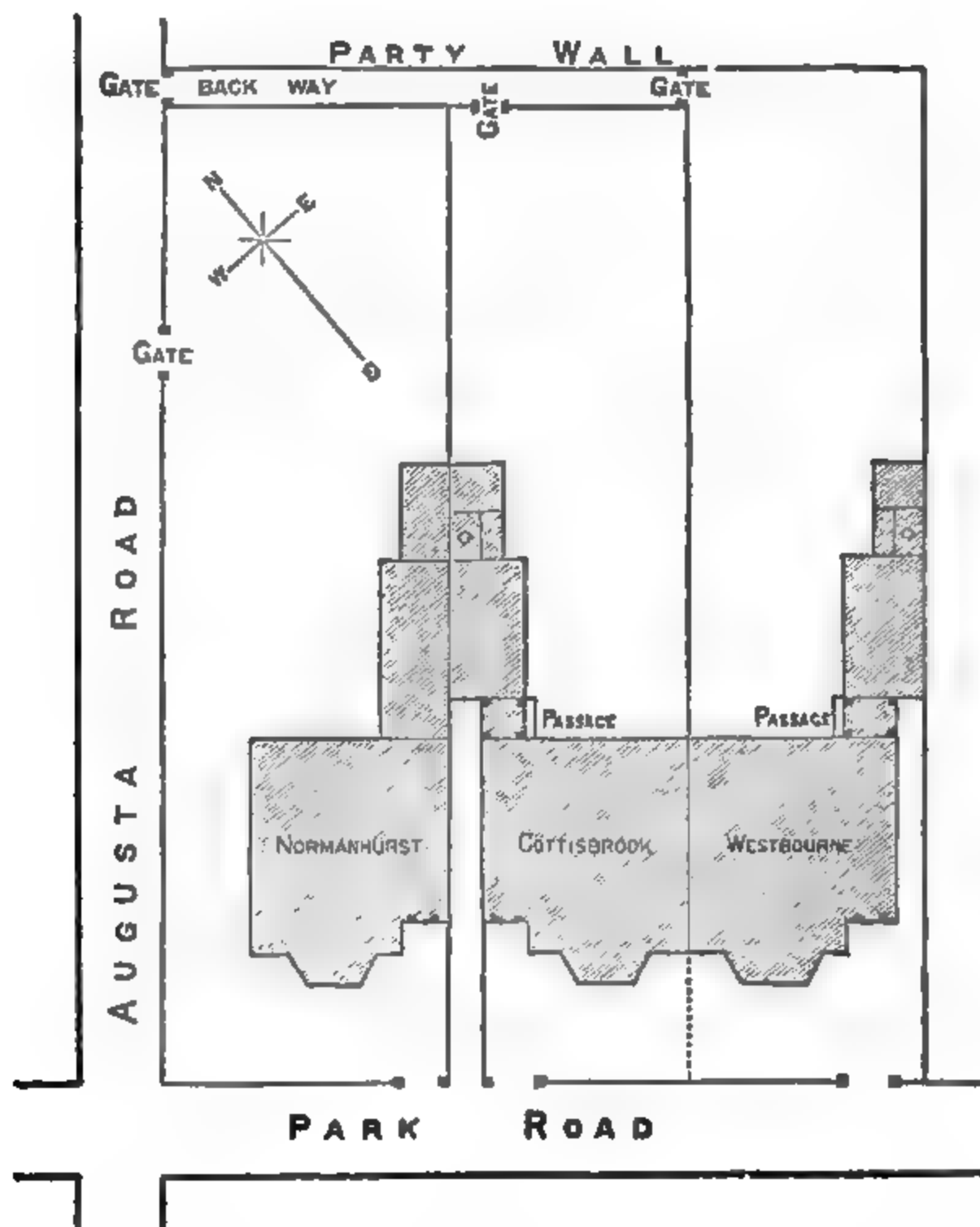
The garden of "Westbourne" extended right up to the above-mentioned party-wall, but the gardens of "Cottisbrook" and "Normanhurst" stopped about four feet short of it, a strip of land thus being left between the party-wall and those two gardens. This strip of land thus divided off and separated from the other land comprised in the two leases, Letts laid out as a back private way from Augusta Road to the gardens of "Cottisbrook" and "Westbourne," this backway being inclosed throughout its length on the one side by the party-wall and on the other by the garden walls of "Normanhurst" and "Cottisbrook." "Cottisbrook" and "Westbourne" each had a gate in its garden wall opening into the back-way, but "Normanhurst" had none, as it had a side entrance directly into Augusta Road. The entrance from the back-way into Augusta Road, which was a public road, was closed by a gate which was usually kept locked, and of which, until the assignment to the defendant hereafter stated, Letts or his agent had the key.

A plan of the properties appears on the next page.

The back-way having thus been formed and used as a mode of access to the gardens of "Cottisbrook" and "Westbourne," by an indenture, dated the 29th of June, 1878 — after reciting the second lease and the erection of the two houses "Cottisbrook" and "Westbourne" — Letts assigned to John Aston and George Lyttelton Aston, "All and singular the said piece of land and premises comprised in and demised by the hereinbefore recited indenture of lease or expressed so to be, and also all those the said two messuages erected on the said piece of land, together with their and every of their rights, members and appurtenances," for the residue of the said term of ninety-nine years granted by such lease, by way of mortgage for

securing £950 and interest. The terms of that assignment thus included the site of so much of the back-way as was conterminous with "Cottisbrook."

By an indenture of the 2d of July, 1878, Letts assigned the plot of land demised by the first lease, and also the house thereon, called



"Normanhurst," "with their and every of their appurtenances," to John Careless for the residue of the term by way of mortgage for securing £700 and interest. The plot of land comprised in that assignment was therein described by identically the same description as that in the lease, and consequently the assignment included the soil of so much of the back-way as was conterminous with "Normanhurst."

By an indenture of the 14th of December, 1878, after reciting the

second lease of the 5th of October, 1877, with the description of the plot comprised therein, and also the mortgage of the 29th of June, 1878, to J. Aston and G. L. Aston, Letts and his said mortgagees, J. Aston and G. L. Aston, for the considerations therein mentioned, assigned to the defendant Edward Alabaster, for the residue of the term granted by that lease, and discharged from the mortgages thereon, "All the said piece or parcel of land, hereditaments, and premises by the said indenture of the 5th day of October, 1877, expressed to be demised, together with the two messuages or dwelling-houses ('Cottisbrook' and 'Westbourne') erected thereon since the date of the said lease, with their rights, easements, and appurtenances." Upon the execution of that assignment Letts handed to the defendant the keys of the garden gates of "Cottisbrook" and "Westbourne," and also the key of the gate leading from the back-way into Augusta Road.

By an indenture of the 13th of November, 1879, Letts, for the consideration therein mentioned, assigned the plot of land "comprised in and demised by" the first lease, and also the house thereon called "Normanhurst," together with the appurtenances, to one Flint, absolutely, for the residue of the term, but subject to the mortgage to Careless: and by an indenture of the 13th of December, 1880, Careless and Flint, for the consideration therein mentioned, assigned the same premises to the plaintiff, Henry Brown, for the residue of the term, discharged from the mortgage thereon.

Neither of the assignments of "Normanhurst" contained any reservation in terms of a right of way for the owners or occupiers of "Cottisbrook" or "Westbourne" over the piece of private way at the back of "Normanhurst," and, in fact, none of the deeds relating to the several properties noticed the existence of the back-way, or contained any reference to it in express terms. There were no plans to any of the deeds except the two original leases, and each of those plans showed simply a rectangular piece of land colored pink, which included the soil of the corresponding piece of the back-way, but without any line or other indication of an intended back-way.

Disputes having arisen between the plaintiff and the defendant as to whether the defendant had, under the assignment to him, any right of way over the plaintiff's piece of the private way at the back of "Normanhurst," the plaintiff brought this action, claiming a declaration that the defendant was not entitled, as against the plaintiff, to any right of way from or to the defendant's two houses over or across the plaintiff's land demised by the first lease to or from Augusta Road; and an injunction to restrain the defendant from passing over or otherwise trespassing upon the plaintiff's said land.

In his statement of claim the plaintiff alleged, that none of the deeds under which he and the defendant respectively claimed, contained any reservation or grant of any right of way over the land demised by the first lease to or for the benefit of the owner, lessee,

or occupier of the hereditaments comprised in the second lease; and that, consequently, the defendant was not entitled to any such right of way.

The statement of defence contained the following allegations:

“(7.) Prior to and at the date of the said indenture of the 14th of December, 1878” — the assignment of “Cottisbrook” and “Westbourne” to the defendant — “and prior to the 29th of June, 1878” — the date of the mortgage of those two properties — “the said way or passage was, and ever since has been, necessary for the proper enjoyment of the part of the land and houses conveyed thereby and for which it had been previously used. Without the said way or passage, egress or ingress from the back part of the two houses could not and cannot be made. It was a continuous and apparent way or passage used by the said William Letts, the common owner of what is now the plaintiff’s and defendant’s land, previous to and at the time of the making of the said indenture and prior to the 29th of June, 1878, and was necessary for the comfortable enjoyment of the part granted by him to the defendant; and by the grant of the land and houses thereon of the 14th of December, 1878, the said William Letts passed the right of way over the said way or passage to the defendant.

“(8). The said way or passage was incident to the defendant’s grant under the indenture of December 14th, 1878, which recited the indenture of the 29th of June, 1878.

“(9.) Furthermore, there was at the time of the making of the indentures of the 29th of June, 1878, and of the 14th of December, 1878, an implied grant of the way or passage to the defendant, and the said J. Aston and G. L. Aston.” And lastly, the defendant insisted that for the reasons aforesaid the plaintiff was not entitled to the declaration or relief he asked.

The plaintiff thereupon joined issue, and the action now came on for trial.

A plan of the property — of which plan the above is a reduced copy — was put in evidence; and it was in fact admitted by the plaintiff that at the dates of the indentures of the 29th of June, 1878, and the 14th of December, 1878, the back-way was existing as shown on the plan, with the two gates opening into the gardens of “Cottisbrook” and “Westbourne.”

The plan also showed, as the fact was, that “Cottisbrook” and “Westbourne” each had, in addition to the usual front or main entrance to the house, a side or tradesmen’s entrance by an open passage about five feet wide from Park Road, leading up to a side door, which by one step upwards gave admission into a back hall or passage about four feet wide, paved with encaustic tiles, and communicating on one side with the entrance-hall of the house and on the other with the kitchen and other domestic offices. At the further end of this back hall or passage, a door opened by two

descending steps into the back garden of the house. Beyond the kitchen and offices were a privy and midden; and the evidence showed that in the absence of a right of way from Augusta Road to the garden and back premises of the house, the only mode of conveying manure, &c., into the garden, or of carrying away refuse from the back premises, was by going through the tiled passage or back hall of the house. The plaintiff's surveyor admitted in cross-examination that the back-way was essential to the comfortable enjoyment of each of the two houses, as being the only convenient way by which manure could be taken into the garden, coals brought into the house, or the contents of the midden and privy removed.

KAY, J. This case raises a question of very considerable interest, which has been discussed in a great many authorities, several of which have been cited to me.

[His Lordship, after describing the three properties, "Westbourne," "Cottisbrook," and "Normanhurst," and the approaches to the gardens of the two first-mentioned properties from Park Road in front through the passage or back hall, and from Augusta Road by the back-way at the rear, said it was obvious that the passage or back hall was not intended for the removal of garden manure, or anything of that kind, and could not really be conveniently used for that purpose, and that at the date of the assignment of the 14th of December, 1878, by which "Westbourne" and "Cottisbrook" became vested in the defendant, and of the assignment of the 13th of November, 1879, by which "Normanhurst" became vested in the plaintiff's immediate predecessor in title, the back-way was the most convenient way, and an obviously intended convenience, for approaching the gardens of "Westbourne" and "Cottisbrook," and that it did not afford any communication whatever to the garden of "Normanhurst," which was completely walled off from it. His Lordship then stated the two last-mentioned assignments and the assignment in 1880 to the plaintiff, and proceeded:—] So that the plaintiff took, by conveyance, "Normanhurst," after "Cottisbrook" and "Westbourne" had been sold and conveyed to the defendant. At the time the defendant bought, this formed back-way was existing, and there were gates from it into the gardens both of "Westbourne" and "Cottisbrook."

Now, the question is, whether the conveyance to the defendant, which contains nothing applicable to a right of way along this back-way, but the ordinary general words "rights, easements and appurtenances," passed a right of way through those gates from the gardens of "Cottisbrook" and "Westbourne" along this back-way into Augusta Road.

Of course at the time when the conveyance was made this right of way was in no sense an easement, because all three properties belonged to the same person; and the question divides itself into two — first of all, was this way a way of necessity? And, secondly, if

it was not a way of necessity, could it be held to pass by implied grant?

✓ Now, as a way of necessity I think it is difficult to support it, for the following reason. A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor; and it is quite clear that the grantor has a right himself to elect in which line, in which course, the way of necessity should go. Here, there is no case of election. The claim is to a way over this particular road, without any right of election at all on the part of the grantor. That of itself would be enough to show it is not a way of necessity. But there is also this consideration; if it be a way of necessity, then, whether it had been formed or not, the way would pass over the ground of "Normanhurst"; that is to say, supposing there had been no back-way and the gardens of "Westbourne" and "Cottisbrook" had been completely shut off from communication with any road except through the passages in these houses, the tiled passages which I have described, if the purchasers of "Cottisbrook" and "Westbourne" were entitled to ways of necessity, it must follow that "Westbourne," which is the most eastern of these properties, would be entitled to a way of necessity over the ground of "Cottisbrook," and over the ground of "Normanhurst," and that "Cottisbrook," which is the middle one, would be entitled to a way of necessity over the ground of "Normanhurst." To my mind it is clearly impossible so to hold, because, if any one had bought "Westbourne" or "Cottisbrook" without any access over the ground of "Normanhurst" to Augusta Road, but only with access to the garden by means of a tiled passage, it seems to me quite impossible to say that he should also have over the adjoining land, which was then a garden laid out as the garden of the house, a way in some direction or another into Augusta Road. Therefore I am clearly of opinion that this is not a way of necessity.

Then comes the question whether, even if it be not a way of necessity, it may not pass under the doctrine of an implied grant of a continuous and apparent easement. It is said, and forcibly, that a right of way is not a continuous and apparent easement, and for that is cited a passage from Mr. Gale's well-known book; but no other authority has been cited.

Let us see how the law stands. In the case of *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1, part of the tenement granted consisted of a coal shoot and of certain pipes, and Lord Chief Justice Tindal said, 5 Bing. N. C. 24: "We cannot therefore feel any doubt, but that under the description contained in the lease, the coal shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself."

In that case there was over an adjoining tenement of the lessor a passage by which this coal shoot and the pipes could be approached,

and the jury found in their verdict that the passing and re-passing over that way or passage was not merely convenient but necessary "for the use of the coal shoot, and of the pipes, and of the repairing and amending the same, and the side or wall of the house." Upon that the judgment proceeds, 5 Bing. N. C. 25: "Since, therefore, as it appears to us, the right in question" (that is the right of passing to and from this coal shoot and pipes) "passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject matter of demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or not pass to the lessees under the express words used in the lease itself, as 'an appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises, belonging or appertaining.' There are strong authorities in the law books to show these words capable of a wider interpretation, and of carrying more than is *an appurtenant* in the strictly legal sense of that word, where such interpretation is necessary in order to give that word some operation." The learned Judge refers to the cases and then says: "But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion on this second point." That case has been followed and commented on in a great many subsequent cases.

The rule laid down in Sheppard's Touchstone, page 89, is that, by the grant of anything, "*conceditur etiam et id sine quo res ipsa non esse potuit.*" That seems to be really the case of a way of necessity.

In *Langley v. Hammond*, Law Rep. 3 Ex. 161, there was a surrender by a lessee to his lessor of part of the demised premises, "together with all ways, &c., therewith now used, occupied, and enjoyed;" and in that case Lord Bramwell's words, which have been referred to in subsequent cases, were these (Law Rep. 3 Ex. 170): "Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these." Those words being, as I have said, "therewith now used, occupied, and enjoyed." That was the point which was raised in the well-known case of *James v. Plant*, 4 Ad. & E. 749.

In the later well-known case of *Watts v. Kelson*, Law Rep. 6 Ch. 166, Lord Justice Mellish, in delivering judgment, said (Law Rep. 6 Ch. 174): "We may also observe that, in *Langley v. Hammond*, Law Rep. 3 Ex. 161, Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed

road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." I think there is a mistake there: the words before Lord Bramwell were not the ordinary words, but were extraordinary general words, such as those used in *James v. Plant*, 4 Ad. & E. 749.

In an earlier authority — *Pearson v. Spencer*, 3 B. & S. 761 — the case is thus stated in the head-note: "Where the owner of a farm divided it by his will into two portions, devising them to A. and B. respectively, and the portion of B. was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of A., and the devisor during his life had used a way in a certain direction over that property: held, affirming the decision of the Queen's Bench, that a right to use that way passed to B. by the devise."

Now I pause there to say that this is distinctly an advance of the doctrine. That particular way was not of course necessarily a way of necessity. It was not held that a way of necessity passed, but that this particular way passed, and the ground of the judgment given by Chief Justice Erle is this (3 B. & S. 767): "We have been much struck with the argument of Mr. Mellish, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the Court below on the construction and effect of James Pearson's will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling-houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependance*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. There are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependance on the plaintiff's land of a right of way over it in the customary manner." There is the distinct decision of the Court of Exchequer Chamber that a way in a particular defined route which is not a way of necessity may, nevertheless, pass by implied

grant — implied grant, that is, by the owner who has unity of possession both of the close granted and of the adjoining close over which that particular way passed.

In *Wheeldon v. Burrows*, 12 Ch. D. 31, as is well known, the Court of Appeal drew a distinction on the much-contested question what rights were reserved to a grantor, and the distinction, as taken in the language of Lord Justice Thesiger, which has been much considered and approved of by other Judges, and which has been often quoted since, is this (12 Ch. D. 49): “We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements)” — and the interpretation there interposed is necessary, because, where the owner of two tenements grants one of them, there can be no easement at the moment of the grant over the other tenement, the two tenements having belonged to one and the same person, and an easement being a right over the land of somebody else — “or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant.” That is the broad distinction which has been recognized, as far as I know, ever since, between the implied grant of an easement and the reservation of an easement.

In the case of *Bayley v. Great Western Railway Company*, 26 Ch. D. 434, the point came before the Court of Appeal. That was a case where the railway company had purchased a piece of land on which was a stable, and by the conveyance to the company the premises were granted “with all rights, members or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof.” The vendor had many years previously made a private road from the highway into the stable over his own land for his own convenience, and had used it ever since. The soil of the road was not conveyed to the company, and no express mention of it was made in the conveyance, and it was held that, notwithstanding the unity of possession of the stable and private house, the right of way passed to the company under the general words of the conveyance. In that case Lord Justice Bowen says this, 26 Ch. D. 453: “This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary.” I do not mean to rely in the least on that dictum, because, as I have said, here we have not got the case of a way of necessity.

But there is another authority of *Ford v. Metropolitan Railway Companies*, 17 Q. B. D. 12, which was before the Court of Appeal. The case is thus stated in the head-note: "A house was divided into a front and a back block: and the plaintiffs were lessees of three rooms on the first floor in the back block. The lease did not expressly grant any mode of access. Access to the rooms demised to the plaintiffs was gained from the street by passing through a hall or vestibule, and then up some stairs to the plaintiffs' rooms. The defendants, in the exercise of compulsory powers under the *Railways Clauses Consolidation Act*, took down the front block of the house and removed the hall. The interference with the hall and the injury to the access to the rooms of which the plaintiffs were lessees, lessened their value. An arbitrator having awarded compensation to the plaintiffs under the *Lands and Railways Clauses Consolidation Acts*: — Held, that the award was valid on the grounds, first, that compensation may be obtained under the *Railways Clauses Consolidation Acts*, 1845, for injury done to land by the execution of the works, if it is sufficient to lessen the value thereof; secondly, that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that an interference with this *quasi*-easement was sufficient to give rise to a valid claim for compensation."

That was not a case which depended upon any extraordinary general words like "used and enjoyed;" but the Court, on looking at the surrounding facts, found there was a formed mode of access through other property adjoining belonging to the grantor, and accordingly came to the conclusion that there was an implied grant of that particular formed mode of access, although there were no special words referring to it, and no general words which could extend the grant, like the words "usually held and enjoyed therewith." Indeed it has been doubted — and on that there seems to be a present conflict of authority — whether those words "usually held and enjoyed" have any effect in a matter of this kind: because Lord Romilly, M.R., in *Thomson v. Waterlow*, Law Rep. 6 Eq. 36, said the question was, whether you could, by those words, create an easement. That doubt of his is commented upon in *Kay v. Oxley*, Law Rep. 10 Q. B. 360, by Lord Blackburn, who says (Law Rep. 10 Q. B. 367), "But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right."

I leave that contest where it is; but it seems to me that the law is this — that a particular formed way to an entrance to premises like these, "Westbourne" and "Cottisbrook," which leads to gates in a wall, part of these demised premises, and without which those gates would be perfectly useless, may pass, although in some sense

it is not an apparent and continuous easement; or rather, may pass — because, being a formed road, it is considered by the authorities, in cases like this, to be a continuous and apparent easement — by implied grant without any large general words, or indeed without any general words at all.

Here I have a case in which these two gardens, although they are not absolutely inaccessible, are inaccessible except through a part of the house, unless they are to be reached by the gates at the bottom of the gardens communicating with this formed back-way. That it was intended, looking at all the facts, that the persons to whom “Westbourne” and “Cottisbrook” were conveyed should have the use of those two gates and of this back-way, is, to my mind, beyond all doubt. Then, although I agree that it is not for all purposes a way of necessity, do I want any express grant? It seems to me to be clear on the authorities that an express grant is not wanted in such a case as this.

Therefore, I hold that the right to use this back-way in the same mode as it was usable by the occupiers of “Cottisbrook” and “Westbourne” at the time of the grant of these properties did pass by implied grant, and accordingly this case must be decided on that footing. The plaintiff, the present owner of “Normanhurst,” seeks a declaration that the defendant is not entitled to have a right of way. I cannot make that declaration; on the contrary, I make the declaration that the defendant is entitled to the right of way as I have described it, and the plaintiff must pay the costs of the action.¹

JOHNSON v. JORDAN

2 Met. (Mass.) 234. 1841.

TRESPASS for breaking and entering the plaintiff's close, subverting his soil, &c. The parties agreed the following facts: —

The plaintiff and defendant, at the time of the alleged trespass, severally owned in fee a messuage and land, adjoining each to the

¹ As to what easements are continuous and apparent, see *Marshall Ice Co. v. LaPlant*, 136 Iowa 621; *Duvall v. Ridout*, 124 Md. 193; *Gorton-Pew Co. v. Tolman*, 210 Mass. 402; *Bonelli Bros. v. Blakemore*, 66 Miss. 136; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Kelly v. Dunning*, 43 N. J. Eq. 62; *Tooth v. Bryce*, 50 N. J. Eq. 589; *Larsen v. Peterson*, 53 N. J. Eq. 88, *post*, p. 521; *Michelet v. Cole*, 20 N. M. 357; *Butterworth v. Crawford*, 46 N. Y. 349; *Parsons v. Johnson*, 68 N. Y. 62; *Paine v. Chandler*, 134 N. Y. 385; *Baker v. Rice*, 56 Ohio St. 462; *Kieffer v. Imhoff*, 26 Pa. 438; *Liquid Carbonic Co. v. Wallace*, 219 Pa. 457; *Prov. Tool Co. v. Corliss Engine Co.*, 9 R. I. 564; *Howell v. Estes*, 71 Tex. 690; *Hammond v. Ryman*, 120 Va. 131; *Miller v. Skaggs*, 79 W. Va. 645; *Thomas v. Owen*, 20 Q. B. D. 225; *Schwann v. Cotton*, [1916] 2 Ch. 459; *Hansford v. Jago*, [1921] 1 Ch. 322.

Compare *German Savings Soc. v. Gordon*, 54 Oreg. 147; *Hoffman v. Shoemaker*, 69 W. Va. 233; *Westwood v. Heywood*, [1921] 2 Ch. 130; 65 U. P. L. Rev. 77-80.

other, and fronting on Temple Street in Boston. In 1804, both said messuages and lands were owned by William Breed, who occupied one of them himself, and laid an artificial drain or conduit through the same into Ridgway's Lane; which drain was used by said Breed, and also, by his permission, by the tenants to whom he leased the other messuage, for the purpose of leading off waste water from the buildings on his said lands, into a common sewer of the city, situated in said lane. Said Breed died seised of said messuages, &c., in 1817, having devised the use thereof to his wife for life, and the remainder to Peter O. Thacher in fee. After said Breed's decease, his widow took possession of said messuages, &c., and held the same, occupying one of them, and leasing the other, until her death, April 10th, 1825, when said Thacher took possession thereof, and continued seised until the 13th of May, 1825, on which day he divided the same into several lots; the messuage of the defendant, in which a portion of the drain aforesaid was situated, being one, and the messuage of the plaintiff, in which another portion of said drain was situated, being the other; and on said day sold each of said lots at public auction. The messuage of the defendant was purchased, at said sale, by Enoch Kendall, and the messuage of the plaintiff by John P. Thorndike, as appears by said Thacher's deeds conveying the same, which are to be taken as part of this case. In November, 1825, said Thorndike conveyed his messuage to the plaintiff, and in July, 1826, said Kendall's executor conveyed his said messuage to the defendant.

After the said conveyances by Thacher, the waste water from the defendant's messuage ran in said drain through the plaintiff's land, into the common sewer, until May 1st, 1835. On that day, the plaintiff intentionally stopped up that part of the drain leading from the defendant's messuage, which was on the plaintiff's land; and in June following, as alleged in the plaintiff's declaration, the defendant entered on the plaintiff's land and opened the drain and removed the obstruction, doing no damage except such as was necessary to accomplish said act, and then closed the drain and restored the soil to its former condition.

The parties also agreed, that any further evidence, legally admissible, might be introduced by either party, and that the jury should find, under the direction of the court, whether the defendant was or was not guilty, and if guilty, assess damages; and that either party might except to the ruling of the judge before whom the case should be tried, upon the foregoing facts agreed, and upon the further evidence that should be introduced.

The deed from Thacher to Kendall was a lot of land, without mention of the drain, or of privileges and appurtenances. It was stated in said deed that Thorndike had the right to have a gutter on the side of the stable adjoining the lot conveyed to Kendall; and the deed was on condition that Kendall and his assigns should never open any windows or light on the side of any building that might be

erected on the premises next to the mansion house sold to Thorndike.

At the trial before *Wilde, J.*, the foregoing statement of facts, with the papers therein referred to, were submitted to the court and jury. The defendant was also permitted to introduce evidence to prove that at the time of the aforesaid deeds of conveyance, made by Thacher, no drain could be made, with reasonable labor and expense, to carry off the waste water from the sink in the defendant's messuage, in any other direction than through said land of the plaintiff, and therefore that said drain was a drain of necessity.

The plaintiff was then permitted to introduce evidence to prove, that at the time aforesaid, and ever since, a drain could conveniently have been made, with reasonable labor and expense, from said sink, without going through the plaintiff's land as aforesaid.

The judge instructed the jury, that upon the facts agreed, if they were satisfied, from the other evidence introduced by the parties, that with reasonable labor and expense, a drain could be conveniently made, without going through the plaintiff's land, they should return a verdict for the plaintiff. To this instruction the defendant excepted.

A verdict was returned for the plaintiff. Judgment to be rendered thereon, if the instruction of the judge was correct; otherwise, the verdict to be set aside, and a new trial granted.

This case was argued at March Term, 1840.

SHAW, C. J. In an action of trespass *quare clausum fregit*, the defendant justifies under a claim of right to enter, and open and cleanse a drain, running from his own house into and through the defendant's premises, to a sewer in Ridgway's Lane. If he has such a right, it is a good justification; it being admitted that he entered for that purpose, and did no damage beyond what was necessary to accomplish it. But the plaintiff contends that the defendant had no right to continue the drain through his premises; and this is the question for the consideration of the court.

It is very clear that whilst both estates were held by the same owner; he had a right to carry his drain as he pleased, through any part of his own grounds; and so long as both tenements were owned and occupied by the same person, no easement was created, or began to be created, in favor of one, and operating as a service or burden upon the other. So long, therefore, as such unity of title and of possession subsists, no right of easement is annexed to one tenement or charged on another; and it is quite immaterial how long the drain has subsisted during such ownership.

If such an owner will convey one of the tenements and retain the other, he may grant the right of drain, or not, to pass with the estate conveyed, or may reserve such a right over the estate conveyed, for the benefit of the one retained, as he pleases. It is a matter of contract, and must depend entirely upon the construction of the conveyance. Supposing this to be clear, the question recurs, What con-

struction will the law put upon a conveyance, where the intention of the parties in this respect is not expressed in terms?

In the first place, it is proper to distinguish an artificial gutter of this description, made for the purpose of draining, from a natural watercourse, the rights of parties to which depend upon a different principle. Every person, through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land, on the same watercourse, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it; and disuse cannot destroy or suspend it. Unity of possession and title in such land with the lands above it or below it does not extinguish or suspend it.

This case is also to be entirely distinguished from one wherein the declivity of the land and the relative position of the tenements are such, that a drain cannot be formed for the benefit of one, without passing through the other. Such a case might stand upon a different ground. But in the present case, it was found by the jury, that a drain could be conveniently made, with reasonable labor and expense, from the defendant's house, without going through the plaintiff's land.

There are some general and well-settled rules of construction of conveyances, which tend in some degree to settle the question. The language of the deed is the language of the grantor; he selects the terms, and it being supposed that he will insert all that has been agreed upon beneficial to himself, and will be less careful to state fully all which is beneficial to the grantee, the language is to be construed most strongly against the grantor.

Another well-settled rule of construction is, that a grant of any principal thing shall be taken to carry with it all which is necessary to the beneficial enjoyment of the thing granted, and which it is in the power of the grantor to convey. When therefore a party has erected a mill on his own land, and cut an artificial canal for a raceway, through his own land, and then sells the mill, without the land through which such artificial raceway passes, the right to use such raceway through the grantor's land shall pass as a privilege annexed *de facto* to the mill, and necessary to its beneficial use. *New Ipswich Factory v. Batchelder*, 3 N. H. 190.

Under these rules, it might perhaps be held, that if a man, owning two tenements, has built a house on one, and annexed thereto a drain, passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee: Whereas, if he were to sell

and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms, when it naturally would be, if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance. *Leonard v. White*, 7 Mass. 8; *Grant v. Chase*, 17 Mass. 443.

But neither of these rules will apply to the present case, because it appears by the deeds themselves, as well as by the other evidence in the case, that the two conveyances from the owner of the whole, under which the parties claim, were simultaneous. It is therefore much more like a partition between tenants in common, where each party takes his estate with the rights, privileges, and incidents inherently attached to it, than like the case of grantor and grantee, where the grantor conveys a part of his land, by metes and bounds, and retains another part to his own use, and where the question is, upon the terms of the deed, whether an easement for drainage has been granted with the estate conveyed over that retained, or reserved over that conveyed, for the benefit of that retained.

In the present case, the estates were both owned and occupied by Mr. Thacher until the sale made to Mr. Thorndike and Mr. Kendall, under whom the plaintiff and defendant respectively derive title. Both of these deeds bear date the same day. Each refers to the estate described, as this day sold to the other. Both deeds must be taken and construed together. In the deed to Thorndike, an easement for a gutter was created; and in the deed to Kendall, the same is charged as a perpetual servitude, in favor of Thorndike and his heirs. The conveyance to Kendall was made upon an onerous condition never to open windows in any building to be erected on the premises, on the side next to the dwelling-house conveyed to Thorndike; a condition manifestly designed for the benefit of the estate conveyed to the latter; and in the deed to Thorndike, this restriction upon the estate conveyed to Kendall is recited; intended, no doubt, to show that the estate to Thorndike and his assigns, was thereby enhanced in value. The well-known maxim of construction, and a very sound one, is *Expressio unius exclusio est alterius*. Here was a division of these two tenements intimately connected with each other, with detailed provisions in respect of the rights which each should have in the other, and the duties to which each should be subject in favor of the other. If it was intended that one should have a perpetual right of drainage through the other, with a right of entry at all times to repair and relay such drain, especially where it is found not to be necessary to the enjoyment of the estate granted, it seems reasonable to suppose that it would have been expressed. As no such right was expressed, we are of opinion that it was not intended to be granted; and as it was not necessary to the enjoyment

of the estate, and had not been *de facto* annexed, so as to pass by general words as parcel of the estate, it did not pass to the defendant's grantor by force of the deed. As about ten years only elapsed after these conveyances, and the consequent division of the two tenements between different proprietors, before the grievance complained of, it is very clear that the defendant derived no right to the easement by actual use and enjoyment. Such a right in the estate of another can be created by actual use, only when such use has been adverse, peaceable, and uninterrupted, and continued for a period of twenty years.

*Judgment on the verdict for the plaintiff.*¹

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ANDERSON v. BLOOMHEART ET AL.

101 Kan. 691. 1917.

APPEAL from Lincoln district court; DALLAS GROVER, judge. Opinion filed November 10, 1917. Affirmed.

The opinion of the court was delivered by

MASON, J.: The defendants are the owners of two adjoining city lots, one vacant and the other occupied by a two-story building. They rented the building (excepting the second story) to the plaintiff by a five-year lease containing a covenant for quiet enjoyment. A year later they were about to erect upon the vacant lot a structure which would cut off the light and air from the basement windows of the building occupied by the plaintiff. He brought an action seeking to enjoin such obstruction on the ground that it would render the basement practically useless to him. A demurrer to his petition was sustained, and he appeals.

By the English common law a conveyance of a part of a tract of land owned by the grantor carried with it by implication the right to the free passage of air and light to the portion conveyed over the remainder, in the absence of any express reference to the

¹ On simultaneous conveyances by grant for value, see *Warren v. Blake*, 54 Me. 276; *Mitchell v. Seipel*, 53 Md. 251; *Collier v. Pierce*, 7 Gray (Mass.) 18; *Randall v. McLaughlin*, 10 All. (Mass.) 366; *Buss v. Dyer*, 125 Mass. 287; *Larsen v. Peterson*, 53 N. J. Eq. 88, *post*, p. 521; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Whyte v. Builders' League*, 164 N. Y. 429; *Swansborough v. Coventry*, 3 Bing. 305; *Allen v. Taylor*, 16 Ch. D. 355; *Hansford v. Jago*, [1921] 1 Ch. 322.

By devise or by partition, see *Jones v. Sanders*, 138 Cal. 405; *Cheda v. Bodkin*, 173 Cal. 7; *Conover v. Cade*, 184 Ind. 604; *O'Daniel v. Baxter*, 112 Ky. 334; *McIntire v. Lauckner*, 108 Me. 443; *Clark v. Debaugh*, 67 Md. 430; *Gorton-Pew Co. v. Tolman*, 210 Mass. 402; *Palmer v. Palmer*, 150 N. Y. 139; *Goodell v. Godfrey*, 53 Vt. 219; *Burwell v. Hobson*, 12 Grat. (Va.) 322; *Muse v. Cash*, 114 Va. 90; *Phillips v. Low*, [1892] 1 Ch. 47; *Schwann v. Cotton*, [1916] 2 Ch. 459. See *Baker v. Rice*, 56 Ohio St. 463; *Rightsell v. Hale*, 90 Tenn. 556.

subject. This rule at one time obtained some recognition in this country, but is now generally repudiated, although it survives in a modified form in some states. (1 C. J. 1227, 1228; 1 R. C. L. 398; 16 R. C. L. 716.) It has long been settled that the doctrine of "ancient lights" has no place in the law of Kansas. (*Lapere v. Luckey*, 23 Kan. 534.) We accept as consistent both with reason and authority these expressions of American courts with respect to the matter of implied covenants:

"The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons, upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of the lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed." (*Keats v. Hugo*, 115 Mass. 204, 215.)

"It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the kindred doctrine of 'ancient windows,' or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community. Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating, and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary buildings, the application of the doctrine would be attended with great uncertainty, and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual incumbrance upon the servient estate, and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good, to leave the parties, on questions of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts." (*Mullen v. Strickler*, 19 Ohio St. 135, 143.)¹

¹ That there can be no implied grant of an easement of light and air on a conveyance of the fee in the United States, see *Kennedy v. Burnap*, 120 Cal. 488; *Ray v. Sweeney*, 14 Bush. (Ky). 1; *Keiper v. Klein*, 51 Ind.

The precise question here presented, however, is whether an easement for light and air may be implied in a *lease* of one tract by the owner of that adjoining it. In a recent note it is said that the decisions slightly predominate in favor of an affirmative answer. (13 L. R. A., n. s., 333.) In the case there annotated (*Darnell v. Columbus Show-Case Co.*, 129 Ga. 62) that view of the question was adopted by an extension of the rule, which had already been confirmed by statute, that —

“When one sells a house, the light necessary for the reasonable enjoyment whereof is derived from and across adjoining land then belonging to the same owner, the easement of light and air over such vacant lot passes as an incident to the house sold, because necessary to the enjoyment thereof.” (p. 336.)

In the opinion it was said that the principle was equally applicable to a lease, and that the reason for it was more cogent in that case because of the tenant's restricted control of the premises. This decision is the less persuasive here because made in a jurisdiction where the English rather than the American rule is followed with respect to the effect of conveyances by adjoining owners. This is true also of the first case cited in the note. (*Ware v. Chew*, 43 N. J. Eq. 493.) The second case cited (*Case v. Minot*, 158 Mass. 577) affirmed the right of the tenant of a room in an office building to damages by reason of the obstruction of a light-and-air shaft or well by the building of a chimney by another tenant — a situation not entirely analogous to that here presented. The third case (*Doyle et al. v. Lord et al.*, 64 N. Y. 432) was qualified by this statement:

“If the yard [in which the owner was about to erect a structure which would cut off the light and air from premises occupied by its tenants] had not been part of the lot upon which the building was standing and if it had not been appropriated to use with the building so as to pass as appurtenant thereto, so far as to give easements therein to the tenants of the building, the plaintiffs could not have complained of the acts of the defendants.” (p. 439.)

In the only other American case cited in the note referred to on this side of the question (*Hazlett v. Powell*, 30 Pa. 293) the part of the opinion bearing upon the matter was a rather casual dictum, apparently made upon the strength of two decisions arising out of sales, not leases. It is clear, therefore, that there is little in the American decisions tending to induce a court which holds that no covenant as to light and air is to be implied in a deed to take a differ-

316; *Keats v. Hugo*, 115 Mass. 204; *Mullen v. Stricker*, 19 Ohio St. 135; *Bailey v. Gray*, 53 S. C. 503.

Contra, *Janes v. Jenkins*, 34 Md. 1; *Geer v. Van Meter*, 54 N. J. Eq. 270. Compare *Rennyson's Appeal*, 94 Pa. 147, 153, where it is said that an easement of light may be raised by actual necessity; and see also *Robinson v. Clapp*, 65 Conn. 365, 385; Georgia, Code (1914), § 3618.

ent view in the case of a lease; although it is also true that the specific decisions of a contrary tendency are not numerous. While it is of course possible to make a distinction based upon the difference between a deed and a lease, we think the reasons for repudiating the doctrine of ancient lights and the rule by which a covenant as to light and air is implied in a deed apply with sufficient force to the present situation to require us to hold that no right with respect to light and air was created by implication under the facts alleged in the petition, and the demurrer was properly sustained.

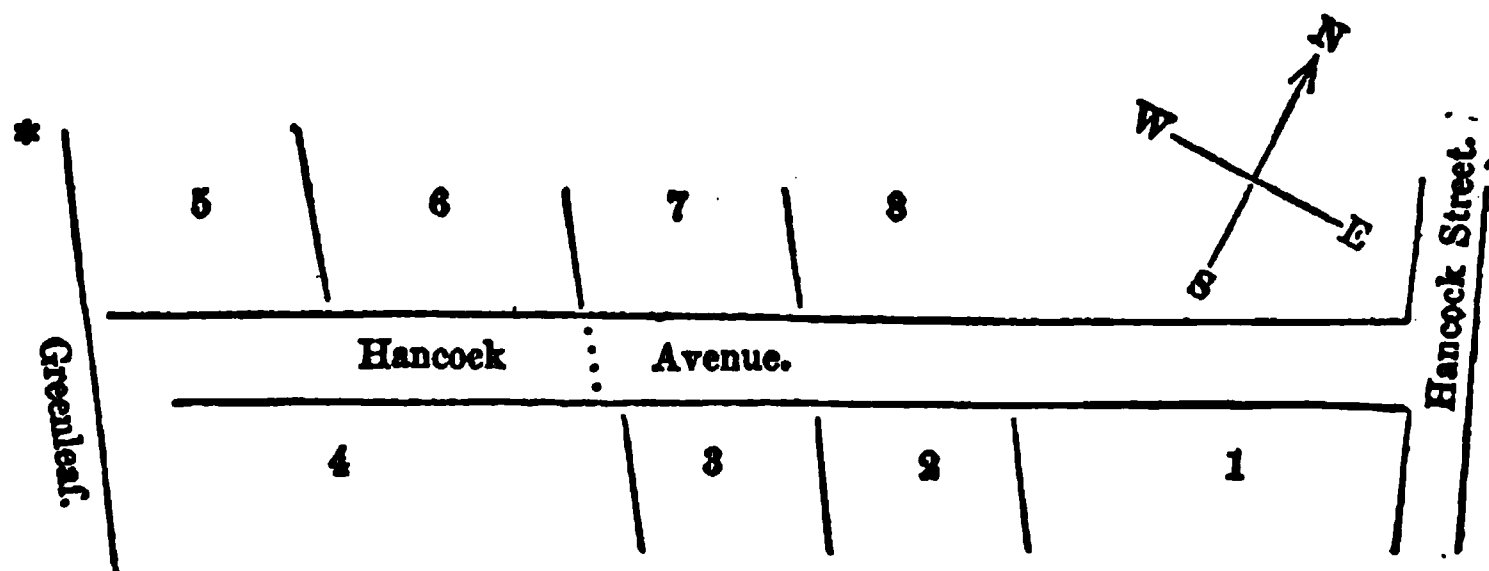
The judgment is affirmed.¹

RODGERS v. PARKER

9 Gray (Mass.) 445. 1857.

ACTION OF TORT for breaking and entering the plaintiff's close in Quincy, and breaking down the plaintiff's fence. The parties submitted the question whether the action could be maintained to the decision of the court upon the following facts:

On the 24th of April 1855 William P. Apthorp offered for sale by public auction house lots on the Apthorp estate in Quincy. The auctioneer exhibited a plan at the sale, (the material part of which is printed in the margin,*) and distributed copies thereof



among the persons who attended. Lot 7 was bid off by the defendant; lot 1 by the plaintiff; and lots 2, 3 and 8 by other persons. Deeds were soon afterwards made by Apthorp to the purchasers, and recorded, describing each lot by its number on this plan, (declared therein to be "recorded with the deed of lot numbered one on said plan,") and as bounded "on a passage called Hancock Avenue on said plan." That avenue was staked out at the time of the auction.

After this sale, and before these deeds were made, Apthorp sold

¹ The plaintiff petitioned for a rehearing on the ground the court had overlooked the defendants' covenant for quiet enjoyment, but a rehearing was denied. The opinion on this petition is omitted.

and conveyed lots 4, 5 and 6, together with that part of Hancock Avenue lying west of a straight line drawn from the southeast corner of lot 6 to the northeast corner of lot 4, to the plaintiff, who afterwards erected a fence across the avenue at the dotted line on the plan. The defendant, some days after requesting the plaintiff to remove the fence, removed it himself, without injuring the materials, and left them by the side of the avenue.

DEWEY, J. As to the right of the defendant to have an open avenue or way, coextensive with the extent of the lot purchased by him, there can be no question. The sale to the defendant was made by one having the entire estate, and was a sale by public auction of house lots laid out and numbered on a plan then exhibited; said lots being bounded by Hancock Avenue, which was also delineated on the plan, which plan was afterwards recorded in the office of registry of deeds. In this state of the facts, the grantor and those who succeed to his title to the remaining land are estopped from denying that there is such a way. Treating the right of the defendant to be of the more restricted character, of a way coextensive with his house lot, this right was violated in the erection of the fence in the line in which it was placed, the same not being at right angles with the avenue.

But the farther ground of defence that the defendant, as purchaser of lot No. 7, may require that the entire avenue as staked out at the time of the auction sale and delineated on the plan shall be kept open as an avenue, having been also urged at the argument, we have also considered that question. This subject has recently been before us for our consideration in the case of *Thomas v. Poole*, 7 Gray, 83, under facts somewhat similar — a way staked out and to be opened by the grantor, the lot sold described as bounded in such way, but having more distinctly stated by words in the recital the extent of the new way. In the present case, the extent of the avenue is clearly marked upon the plan, and is as readily ascertained thereby as it would have been by a recital in words.

In the case of *Thomas v. Poole*, the court held that the way thus staked out and upon a part of which the lot sold was bounded, was to be kept open for its entire distance as thus staked out and exhibited to purchasers, and that the right to have the same kept open was not limited to the extent of the land conveyed to any particular purchaser of one lot. It seems to us that the same principle is applicable to the present case, and that the entire avenue, as staked out and delineated on the plan exhibited at the sale and afterwards recorded, was as respects the plaintiff to be kept open as an avenue. In either aspect of the question the defence is well maintained.

*Judgment for the defendant.*¹

¹ And see *Highland Realty Co. v. Avondale Land Co.*, 174 Ala. 326; *Rogers v. Bollinger*, 59 Ark. 12; *Danielson v. Sykes*, 157 Cal. 686; *Pierce v.*

LARSEN v. PETERSON

53 N. J. Eq. 88. 1894.

HEARD on pleadings and proofs.

PITNEY, V. C. The object of this bill is to establish and protect complainant's right in, and enjoyment of, an easement.

The circumstances, which are not open to serious dispute, are peculiar. For some years prior to and on the 1st day of June, 1893, Mrs. Elizabeth Mabey, of Montclair, Essex county, was the owner of a lot of land fronting on Elmwood avenue, in that city, upon which was a double frame dwelling, comprising, under one roof, two complete dwellings, separated only by an ordinary lath and plaster partition, without any openings. Some years before that date she had procured a well to be drilled in the earth and underlying water-bearing rock in the rear of this building, and had laid therefrom two independent waterpipes placed in the earth, leading to the dwelling, one into the sink of each kitchen. Each dwelling was supplied with an ordinary handpump, and in this manner, and in no other way, each of the separate dwellings was supplied with water. There was nothing visible on the ground in the rear of the house to indicate the existence of a well or its connection with the dwelling, and there was no water-main in the street.

This being the situation, Mrs. Mabey, in the spring of 1893, was minded to sell this property, but was unwilling to sell a part without the whole. At the same time, both complainant and defendant were desirous of purchasing houses for their individual use, and, hearing of this property, called together on Mrs. Mabey—that is, complainant and John Peterson, acting as agent for his wife—and looked at the property. They looked at only one of the dwellings—that in the actual occupation of Mrs. Mabey, the other being in the occupation of a tenant—and were informed, and truly, by Mrs. Mabey, that the two dwellings were precisely alike in all respects, and, indeed, this was plainly indicated by their exterior appearance. In the kitchen of the part occupied by Mrs. Mabey, both complainant

Roberts, 57 Conn. 31; *Smith v. Young*, 160 Ill. 163; *Cleaver v. Mahanke*, 120 Iowa 77; *Riley v. Stein*, 50 Kan. 591; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Iseringhausen v. Larcade*, 147 La. 515; *Young v. Braman*, 105 Me. 494; *Adams v. Produce Exchange*, 115 Atl. (Md.) 106; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Lindsay v. Jones*, 21 Nev. 72; *White v. Tidewater Oil Co.*, 50 N. J. Eq. 1; *Weeks v. New York Ry. Co.*, 207 N. Y. 190; *Collins v. Asheville Land Co.*, 128 N. C. 563; *Chapin v. Brown*, 15 R. I. 579; *State v. Hamilton*, 109 Tenn. 276; *Wolfe v. Brass*, 72 Tex. 133; *Gish v. Roanoke*, 119 Va. 519; *Cook v. Totten*, 49 W. Va. 177; *Espley v. Wilkes*, L. R. 7 Ex. 298.

Compare *Marshall v. Lynch*, 256 Ill. 522; *Dorman v. Bates Mfg. Co.*, 82 Me. 438; *Howe v. Alger*, 4 All. (Mass) 206; *Williams v. Boston Water Power Co.*, 134 Mass. 406; *Ralph v. Clifford*, 224 Mass. 58; *Quicksalt v. Lee*, 177 Pa. 301; *Lins v. Seefeld*, 126 Wis. 610.

and Peterson saw and particularly noticed the pump in the sink and tasted the water from it, and were informed that it came from a drilled well in the back yard, and that both dwellings were supplied in the same way and from the one well. The precise location of the well was not pointed out, and was not known either to Mrs. Mabey or to either of the parties until after the conveyances presently to be mentioned. Both complainant and defendant knew that there was no water-main in the street. On that occasion complainant and John Peterson agreed together, and with Mrs. Mabey, to purchase the property at a price named, and agreed that it should be equally divided between them, and that the title should be made to each in severalty according to a dividing line to be agreed upon between them and actually run on the ground by a surveyor in such a manner that it should run through the partition separating the two dwellings, and then divide the land as nearly equally as practicable. Peterson at the same time gave \$10 for the choice of the houses, and then and there chose the house in which Mrs. Mabey was living; but such choice had no reference to the location or control of the well, and was influenced entirely by the circumstance that the house so chosen had, owing to the shape of the lot, more light and air in its front and side than the other. The survey was had accordingly, and a description of the dividing line given, and deeds of conveyance in accordance with it, dated June 1st, 1893, were executed by Mrs. Mabey on June 5th, and duly delivered at the same moment, one to complainant and the other to Mrs. Peterson, the wife of John. Both parties took possession. Subsequently Peterson discovered that the well was on his land, and then cut the pipe leading to complainant's kitchen, who thereupon attempted to repair it and was prevented by the defendant; whereupon he filed this bill asking that his rights in the premises may be established, and the defendant enjoined from preventing him from renewing the water-pipe connection with the well. Upon the filing of the bill an injunction was granted accordingly, and the complainant took advantage of it to restore the connection between his pump and the well to its former condition.

At the hearing there was no contention that the well did not supply water enough for both families, or that complainant had made an unreasonable use of it.

The above are the facts as I have found them. Peterson does, indeed, deny that he was told on the occasion in question that the other dwelling had a pump like the one they inspected, or that there was but one well for both houses. But the contrary is supported not only by the evidence of complainant, but also by that of Mrs. Mabey and her daughter, both disinterested witnesses — or rather, if they have any interest, it is against complainant, since Mrs. Mabey gave Mr. Peterson a warranty deed — who gave their evidence in a way to command the belief of the court. Besides, Peterson does not deny that he saw the pump and heard that it was,

supplied with water from a well, but does deny that he was told that the other dwelling was similarly supplied. But he knew that both dwellings were a part of one building, and that in external appearance they were precisely alike; that the other dwelling was occupied; he fixed the value of the choice between the two houses at only \$10, which was due, as he admits, to a difference in the size of the front yard, which would necessarily result, as shown by the plot, from a division of it in the way proposed and agreed upon. He does not contend that his choice was due to any supposed difference in the interior of the houses, or to the presence of water in one and its absence in the other, or that he supposed that each house had an independent supply of water. These circumstances render it highly improbable that he did not, in some way, learn that both dwellings were supplied with water in the same way and from the same source. It was, to say the least, not probable that the proprietor of such a lot and building would incur the expense of an independent water-supply to each dwelling.

Upon this case, the complainant, in his able brief, makes two points which support each other, and either of which, standing alone, he contends, entitles him to relief. *First.* That the well and aqueduct running therefrom to complainant's house constitute a change of a permanent nature in the structure of the defendant's tenement, made for the benefit of complainant's tenement by the owner of both, of which defendant had actual notice through her agent before she purchased, and which was of such a nature as to be discovered on an examination, and hence became an apparent and continuous easement in favor of complainant's tenement upon the defendant's tenement. *Second.* That the effect of the transaction between complainant, defendant and Mrs. Mabey, was a purchase by the two jointly from Mrs. Mabey, with an agreement between the two that the property should be divided in the manner stated, and that the arrangement for the supply of water for each house should remain as it was.

It seems to me that the controlling question is, whether the arrangement for the supply of water to complainant's house constituted what is known to jurists as a "continuous and apparent" easement, which was "necessary" in the sense in which that word is used in that connection, for the comfortable use and occupation of the complainant's premises.

As to the quality of its being "apparent," the fact that it was, in part, hidden in the earth, and so not physically apparent to the eye, is not conclusive. The part on complainant's land — the pump — was visible, and the water must have come either from the land actually conveyed to him or from that conveyed to Peterson. Independent of the actual notice, I am of opinion that Mrs. Peterson, under the peculiar circumstances of this case, is chargeable with notice that there was such a pump on the complainant's tenement, and that it

might connect with the well or cistern on the part that was conveyed to her.

It seems to be well settled that the mere fact that a drain or aqueduct, as the case may be, is concealed from casual vision, does not prevent it from being "apparent" in the sense in which that word is used in that connection. The aqueduct, in *Nicholas v. Chamberlain*, 2 Cro. 121; the drain, in *Pyer v. Carter*, 1 Hurlst. & N. 916; the aqueduct, in *Watts v. Kelson*, L. R. 6 Ch. 166; in *Brakeley v. Sharp*, 1 Stock. 9 and 2 Stock. 207; in *Seymour v. Lewis*, 2 Beas. 439, and in *Tooth v. Bryce*, 5 Dick. Ch. Rep. 589, were all buried beneath the surface and not visible to the casual observer, and yet the easement in each case was upheld. The point of actual appearance to the eye was distinctly raised in *Pyer v. Carter*, and overruled. There, as here, the two dwellings were under one roof, and once had a common owner, and had a drain in common for the use of both, which was not visible. Baron Watson, in his considered judgment, used this language: "We think it was the defendant's own fault that he did not ascertain what easements [the drain] the owner of the adjoining house exercised at the time of the purchase." Although this case has been severely criticised as to the main ground upon which it was decided, the part of it just quoted has not been questioned, and the general result was undoubtedly right. See *Tooth v. Bryce*, 5 Dick. Ch. Rep. 599.

It is true that, in each of the cases of aqueducts above cited, both ends of the pipe — as well that from which the flow of water came as that to which it was carried — were probably visible, while here only that end was visible which was on the dominant tenement; but I am of the opinion that where, as here, and in *Tooth v. Bryce*, the dominant tenement is conveyed and the servient tenement is reserved, the controlling fact is that the existence of the *quasi*-easement is shown by something in sight upon the dominant tenement. That is the point to which the attention of the purchaser is naturally directed; and the principle upon which the cases go is that he is entitled to the tenement he buys in its then present condition, and the use of all such easements as are apparent and continuous. Now, the easement which he sees on the tenement which he buys must be held to be apparent.

It seems to me that, in *Tooth v. Bryce*, the result must have been the same if the ram which drove up the water to the tenement conveyed to the complainant, had been entirely invisible.

In the case in hand the controlling fact is that the pump was there visible and in use, and by its connection with the invisible pipe leading to some fountain the house conveyed to complainant was supplied with water.

This view must hold if the defendant's tenement had been retained by Mrs. Mabey and the action were against her instead of Mrs. Peterson; and, according to the well-settled rule in this court, the

result would be the same if Mrs. Mabey had conveyed to Mrs. Peterson and retained the lot conveyed to complainant, provided Mrs. Peterson had notice of the actual fact that the pump on the lot retained was supplied by water from a well which might prove to be on the lot conveyed (see the cases on this point in *Tooth v. Bryce*); and provided, of course, the easement had the other elements requisite, viz., that of being continuous and necessary in the qualified sense in which that word is used in that connection. In short, in my opinion all that is meant by "apparent," in that connection, is that the parties should have either actual knowledge of the *quasi*-easement or knowledge of such facts as to put them upon inquiry.

Next, as to the quality of being "continuous." Mr. Gale, in the later editions of his book — §§ 50, 52 (4th Eng. ed., 1868, pp. 87, 89) — comes to the conclusion that the test of continuousness is that there should be an alteration in the quality — or "disposition" — of the tenement, which is intended to be, and is, in its nature, permanent, and gives the tenement peculiar qualities, and results in making one part dependent, in a measure, upon the other. It is not of the essence of this test, as applied to a watercourse, that the water should flow of itself continuously, but the test is that the artificial apparatus by which its flow is produced is of a permanent nature. It is with a view of bringing out this quality of permanence that the learned author contrasts this class of easements with a right of way, "the enjoyment of which depends upon an actual interference of man at each time of enjoyment." Now, what is meant by that sentence is that the burthen of the easement in the case of a right of way is not felt by the servient tenement except at the moment of each enjoyment of it. A permanent structure upon, or alteration of, the servient tenement is not a necessary element of such an easement. And by the expression "interference of man at each time of enjoyment" is meant no more than an interference with the servient tenement by an entry upon it, as illustrated not only by ordinary rights of way, but also by rights of way with a right to take something from the servient tenement, as in *Polden v. Bastard*, 4 Best & S. 257; L. R. 1 J. B. 156.

I stop here to say that the distinction between a watercourse and a formed and metaled road constructed for permanent use is quite thin, and there have been expressions of judges in modern times intimating an inclination to hold that where a dwelling or other such tenement is conveyed with an artificially-formed road leading to it over other lands of the grantor which are reserved, a right of way ought to be held to pass.

The true distinction between a continuous and a non-continuous easement is again illustrated by the case of the rain-water drain in *Pyer v. Carter*, through which the water actually ran only when it rained, and yet it was held continuous because it was permanent and constituted a permanent alteration in the structure of the tene-

ment. Suppose that in that case it had been necessary for the plaintiff on each occasion of a rain to pump the rain-water from a pit in his cellar into the drain, would it have been, by reason of that arrangement, any the less continuous? I think not. In short, I conclude that the word "continuous" in this connection means no more than this — that the structure which produces the change in the tenement shall be of a permanent character, and ready for use at the pleasure of the owner of the dominant tenement without making an entry on the servient tenement. In *Seymour v. Lewis, supra*, although the water did run by gravity, the head was so small that a sufficient supply could not be procured without the use of a pump, and a pump was in actual use; and yet that did not destroy the continuous character of the easement.

For these reasons I conclude that the easement here in question is both apparent and continuous. That it was "necessary" in the sense in which that word is used in this connection is undeniable.

In this case there is no room for the application of the distinction, even if that distinction were recognized by this court, between the *reservation* and the *grant* of an easement of this character upon the severance of the tenement. The conveyances from the original proprietor, which produced the severance, were simultaneous, and amounted, under the circumstances, to a voluntary partition between complainant and defendant. In such a case, as shown by Chancellor Williamson, in *Brakeley v. Sharp*, 2 Stock. 207, the rule that a man cannot derogate from his own grant does not apply.

I conclude that the complainant is entitled to the relief prayed for, and will so advise.

HIGBEE FISHING CLUB v. ATLANTIC CITY ELECTRIC COMPANY

78 N. J. Eq. 434. 1911.

On final hearing on bill, pleadings and proof.

Complainant is the owner of a rectangular lot of land the dimensions of which are sixty feet by one hundred feet. The land is not adjacent to a highway and no means exists for travel to or from complainant's lot without the necessity of passing over the land of others. The bill seeks to establish a way of necessity across the land of defendant. Complainant purchased the lot referred to in the year 1897 from the executors of Jonas Higbee, deceased. The deed to complainant conveys the lot by metes and bounds, together with the "tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining," but makes no express provision touching any easement of way over any adjoining land. The lot of land when

purchased was vacant salt meadow; a clubhouse has since been erected on it. At the date of the sale the vendors owned the land adjacent to the lot sold on three sides thereof; the West Jersey and Seashore Railroad Company owned the adjacent land on the fourth side. In the year 1910 the same grantors who sold to complainant conveyed the land which has been referred to as adjacent to complainant's lot on the three sides thereof, to defendant.

LEAMING, V. C. 1. It is well settled that a right of way over a grantor's land arises when such grantor sells land wholly surrounded by other land which he retains, or when the part sold is surrounded in part by the land retained and in part by that of a stranger, over which there is no right of access. In such cases the way is a necessary incident to the grant, for without it the grant would be useless; the grant is necessarily for the beneficial use of the grantee and the way is necessary to the use. *Stuyvesant v. Woodruff*, 21 N. J. Law (1 Zab.) 133, 155; *Lore v. Stiles*, 25 N. J. Eq. (10 C. E. Gr.) 381, 383; *French v. Smith*, 40 N. J. Eq. (13 Stew.) 361, 362; 3 Kent. Com. *420; 14 Cyc. 1174 note 33. By the grant to complainant a way of necessity over the remaining lands of grantor was undoubtedly created in favor of complainant.

2. I think it also clear that the sale of the remaining land from complainant's grantor to defendant was not operative to extinguish complainant's rights. Defendant does not occupy the position of an innocent purchaser without notice of complainant's right. An examination of the record title of defendant's grantors would have disclosed not only the conveyance to complainant but also the prior conveyance to the railroad company. The physical conditions then apparent disclosed complainant's isolated lot with no highway as a means of access to it. Not only were these conditions reasonably apparent but defendant, before purchasing, had a survey of the entire premises made and the four corners of complainant's property were staked by defendant as well as the several corners of the tract which defendant was about to purchase. These physical conditions thus actually ascertained by defendant, in connection with the information disclosed by the record, were clearly operative to charge defendant with notice of complainant's rights.

3. The jurisdiction of this court to determine complainant's rights and to locate the part of defendant's land over which said rights may be exercised has been recognized and acted upon in *Camp v. Whitman*, 51 N. J. Eq. (6 Dick.) 467. See, also, *Pearne v. Coal Creek Co.*, (Tennessee), 18 S. W. Rep. 402.

4. In *Camp v. Whitman*, *supra*, it was found as a fact that at the time of the grant the parties actually contemplated a use of the premises granted which required a way for vehicles, and accordingly it was there held that the way should be suitable for such use. In the present case, however, no evidence of that nature exists. On the contrary, the physical conditions surrounding complainant's lot were

of such a nature that a way for vehicles could not well be deemed to have been contemplated by the parties at the time of the grant, and indeed such a way does not seem to have become at any time necessary to the use to which the lot has been devoted. In view of the principles defined in *London v. Riggs* (1880), L. R. 13 Ch. Div. 798, I am unable to find justification for a right of way of necessity in extent more than a footway.

5. The claim on behalf of defendant that complainant is entitled to use the property of the railroad company for access to his lot is clearly untenable. A right of that nature could only be acquired by grant or adverse user for twenty years.

If the parties can agree upon the route of a footway I will advise a decree accordingly, otherwise there may be a reference to a master to determine it.¹

SECTION II

BY REFERENCE TO PREVIOUS USE

SAUNDEYS v. OLIFF

Moore, 467. 1597.

[See this case given on p. 471, *ante*.]

WORTHINGTON v. GIMSON

2 E. & E. 618. 1860.

THE declaration stated that plaintiff was possessed of a messuage, farm, buildings, garden, and land, with the appurtenances, and by reason thereof was entitled to a way from the said messuage, &c., unto, into, through, over, and along certain land of defendant, for plaintiff and his servants, &c., yet defendant obstructed the said way.

Pleas. 1. Not guilty. 2. That plaintiff was not by reason of his possession of the said messuage, farm, buildings, garden, and land, with the appurtenances, entitled to the alleged way in the declaration mentioned, in manner and form as alleged.

Issues thereon respectively.

At the trial before *Williams, J.*, at the Leicestershire Summer Assizes, 1859, it appeared that the plaintiff was the occupier of a farm and house at Naneby, a hamlet of Market Bosworth, in the county of Leicester; and that he also occupied therewith two closes in the adjoining parish of Newbold Vernon. These two closes ad-

¹ As to whether the servient tenement continues bound in the hands of a subsequent purchaser by an easement created by implication, see *Rubio Canon Ass'n v. Everett*, 154 Cal. 29; *Robinson v. Clapp*, 65 Conn. 365; *Ingals v. Plamondon*, 75 Ill. 118; *Edwards v. Haeger*, 180 Ill. 99; *Muir v. Cox*, 110 Ky. 560; *Zimmerman v. Cockey*, 118 Md. 491, 497; *Smith v. Lockwood*, 100 Minn. 221; *Schwann v. Cotton*, [1916] 2 Ch. 459.

joined part of a farm occupied by the defendant under Sir W. Hartopp, and situated in Newbold Vernon. The way mentioned in the pleadings passed from the plaintiff's farm buildings across one of his said closes in Newbold Vernon, and then across the farm of the defendant. It was proved that the way had been used by the plaintiff and his father, who occupied the farm before him, for more than forty years, and that it had been rendered impassable by an obstruction caused by the defendant in January, 1859. It appeared that, since the date of the partition deed hereafter mentioned, the owner of the farm occupied by the defendant had been only a tenant for life. For many years prior to January, 1820, the owners of the two farms had been jointly interested in them, the late Sir E. C. Hartopp being seised of one undivided moiety, and the late Mr. John Pares of the other. In January, 1820, a partition deed was entered into between Sir E. C. Hartopp and Mr. John Pares, whereby the Newbold Vernon portion of the land, with the exception of the two closes before referred to, were conveyed to the use of the Hartopp family, and the Naneby portion, together with the said two closes, were conveyed to Mr. John Pares absolutely. The last-mentioned estate came by sale into the possession of one Harris, who was the owner of it at the time this action was brought. The way had existed and had been used for many years by the occupiers of either farm; but there was no express reservation in that part of the partition deed by which Mr. Pares granted his undivided moiety. The grant by the same deed, by Sir E. C. Hartopp, of his undivided moiety in the Naneby estate to Mr. Pares, conveyed, with other farms, that occupied by the plaintiff, "with their and every of their rights, members, easements, and appurtenances." The jury found that the occupiers of the Naneby farm had enjoyed the way as of fact up to and before the deed of partition, and also that the way had been enjoyed for twenty years since the partition deed up to the time of the obstruction. The learned judge notwithstanding this finding, nonsuited the plaintiff, reserving to him leave to rule that the verdict should be set aside, and a verdict with nominal damages entered for him instead thereof.

CROMPTON, J. I am of opinion that my Brother Williams was quite right at the trial, and that we cannot enter the verdict for the plaintiff upon the findings of the jury. We are asked to do so upon the finding that there had been an actual use of the way, up to the time of the partition; although it is not found that the way was used of necessity. Mr. Gale, in his work on Easements, states very clearly the class of easements which pass by implication. At page 76 (3d ed.,) he says, "Where such easements are in their nature continuous and apparent, they pass upon a severance of the tenements by implication of law, without any words of new grant or conveyance. Indeed properly speaking, such easements are not revived,

but newly created, by an implied grant." "The same observation applies to easements, commonly called 'of necessity.'" He adds: "Other easements, such as ordinary rights of way, will not pass upon a severance of the tenements, unless the owner 'uses language to show that he intended to create the easement *de novo*.'" The last words of this passage are those of Bayley, B., in *Barlow v. Rhodes*, 1 C. & M. 448; in which case a question was raised, which does not here arise, whether parol evidence was admissible in explanation of the terms of a deed of grant. We are also asked to say that the way in dispute in the present case passed under the word "appurtenances" in the deed of January, 1820. But in *James v. Plant*, 4 A. & E. 749, which is relied upon in support of that contention, language was used in the deed of partition which showed that the intention of the parties was that the way should pass, and the court held that the subsequent general word "appurtenances" might be properly construed in a sense wide enough to give effect to that intention. In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute, and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be very naturally supposed to have been the intention of the parties that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease.

HILL, J. I am of the same opinion. I found my judgment upon this, that there is nothing in the deed to indicate that the parties intended to use the word "appurtenances" in any other than the strict legal sense of the word; and that the right of way claimed by the plaintiff is not within that sense. *Rule discharged.*¹

¹ The opinion of WIGHTMAN, J., is omitted.

See *Stevens v. Orr*, 69 Me. 323; *Oliver v. Hook*, 47 Md. 301; *Dural v. Ridout*, 124 Md. 193; *Morgan v. Meuth*, 60 Mich. 238; *Bonnelli v. Blakemore*, 66 Miss. 136; *Spaulding v. Abbott*, 55 N. H. 423; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Michelet v. Cole*, 20 N. M. 357; *Parsons v. Johnson*, 68 N. Y. 62; *Morris v. Blunt*, 49 Utah, 243; *Swazey v. Brooks*, 34 Vt. 451; *Grymes v. Peacock*, 1 Bulst. 17; *Clements v. Lambert*, 1 Taunt. 205; *Whalley v. Tompson*, 1 B. & P. 371; *Polden v. Bastard*, 4 B. & S. 258, L. R. 1 Q. B. 156; *Hall v. Byron*, L. R. 4 Ch. D. 667.

Compare *Thomas v. Wiggers*, 41 Ill. 470; *Atkins v. Bordman*, 2 Met. (Mass.) 457 (but see *Grant v. Chase*, 17 Mass. 443); *Elliot v. Sallee*, 14 Ohio St. 10; *Thomas v. Owen*, 20 Q. B. D. 225; *Hansford v. Jago*, [1921] 1 Ch. 322, 331.

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KAY v. OXLEY

L. R. 10 Q. B. 360. 1875.

CASE stated by an arbitrator, after verdict, taken by consent, for the plaintiff.

The action was brought to try the right of the defendant to obstruct a way which the plaintiff claims a right to use over defendant's land for certain purposes.

The following are the material parts of the case:—

On and previous to the 1st of May, 1860, the defendant was the owner in fee of a dwelling-house, together with the cottage, stable, outbuildings, and garden thereto belonging, now the property of the plaintiff, and called "Roseville," situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, abutting upon a public highway called Horse Shoe Lane, leading from Leeds to Seacroft; and defendant was also the owner in fee of an adjoining farmstead and farm called Rose Cottage Farm, abutting also upon the same highway, and having a private farm road leading from it to the farm buildings, stack-yard, and other premises connected therewith, and to a field adjoining them.

By an indenture of lease, dated the 1st of May, 1860, defendant demised Roseville to R. J. Hudson for a term of ten years from that date, together with "all and singular the rights, privileges, easements, advantages, and appurtenances whatsoever to the said messuage and premises thereby demised, belonging, or in anywise appertaining or therewith used or enjoyed."

At the time of the demise the stable had no upper story, and was of the same height as the adjoining cottage demised with it.

Hudson entered at once into possession, and in the same year built at his expense a hay chamber or upper room over the stable, with two square openings in the east wall of the chamber, of the respective dimensions of 4 ft. 7 in. by 2 ft. 1 in., and 2 ft. 10 in. by 2 ft. 10 in., for the purpose of getting his corn, hay, and straw into his hay chamber, and for which purpose they were adapted. Both openings were fitted with shutters, and the shutters to one of them opened outwards. There were no other means for the admission of light and air into the chamber except a man-hole, 2 ft. 6 in. by 2 ft. 1 in. square, cut through the south-east corner of the floor.

The east wall and the openings abutted upon and looked into the stack-yard and adjoining premises of Rose Cottage Farm; and there was no access to them with carts and wagons out of any part of the premises demised to Hudson, and the only way by which carts and wagons could be brought up to them was by taking them along the private farm road to Rose Cottage Farm.

Before making these alterations, Hudson consulted the defendant and Robert Barber, who was then the defendant's tenant of Rose

Cottage Farm, upon them, and obtained their consent to them, and, at the same time, their permission to use Rose Cottage Farm private road to get to the hay chamber, when completed, with his cart and wagon loads of hay, corn, and straw.

No openings were made in the opposite or west wall of the hay chamber.

The lessee Hudson remained in occupation of Roseville and premises until about March, 1863, when he sublet them to a Mrs. Fletcher, who remained in occupation twelve months; and on her quitting them, Hudson sublet them to Richard Green, who remained in occupation up to the expiration of the aforesaid lease of 1860, and was in actual occupation and using the defendant's farm road, as Hudson had done, to get hay and corn into the hay chamber, at the time when the plaintiff purchased from the defendant, as hereinafter mentioned.

In 1868, the defendant entered into the occupation of Rose Cottage Farm himself, and has continued to occupy it to the present time, having a bailiff residing in the farmstead; and he has been all along and still is the owner of it.

All the time Hudson and his under-tenants were in occupation of Roseville they respectively used the defendant's private farm road with their carts and wagons to get their hay, corn, and straw into the hay chamber, and were never interrupted or interfered with by the defendant or his tenants or servants.

The permission which the defendant gave to his lessee Hudson before building the hay chamber was never withdrawn, but on a few occasions the servants of Hudson and Green asked permission of the defendant's tenant and bailiff to use the road.

In May, 1870, the plaintiff agreed with the defendant to purchase Roseville; and by a conveyance dated the 2d of August, 1870, defendant conveyed to plaintiff in fee "all that messuage or dwelling-house, with the outbuildings, conservatory, gardens, and pleasure grounds thereto belonging, called Roseville, situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, and abutting upon Horse Shoe Lane, leading from Leeds to Seacroft; And all that cottage, stable-yards, outbuildings, and close of land adjoining the said messuage or dwelling-house; Together with all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, and rights of way, waters, watercourses, drains, cisterns, lights and rights of light, liberties, privileges, easements, advantages, and appurtenances whatsoever to the said messuage or dwelling-house, cottage, land, and hereditaments, or any of them, appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto."

At the time of the conveyance the hay chamber, with the two openings in the east side, stood precisely as it had been erected by Hudson.

The plaintiff entered into possession, and began at once to use

the defendant's farm road to bring his carts and wagons up to the openings in the hay chamber, and so to get his hay and straw into the chamber, and continued to do so without interruption up to May, 1873, when, and ever since, he has been refused the use of the road by the defendant.

As things were at the time of the purchase by the plaintiff and now are, the plaintiff had not, nor has he now, any way of putting hay, corn, and straw into his chamber except by using the defendant's farm road, or incurring expense in the necessary alteration of his buildings and premises which he purchased from the defendant.

The question for the court was, whether the plaintiff has a right of way over the defendant's private farm road to and for the use of his hay chamber for the purposes mentioned or any or either of them, either by virtue of or ancillary to the conveyance of 1870.

BLACKBURN, J. I think when we come to understand this case that the plaintiff is entitled to the right of way. The facts are these: the plaintiff purchased Roseville of the defendant, and the defendant by the deed conveyed to the plaintiff the lands and hereditaments, together with all, &c. [The learned judge read the clause.] It is not disputed that if the conveyance had stopped at the word, "appertaining" the plaintiff's case might not have been sustainable, but it goes on to add the words: "or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto." We have now to look at the facts in order to see whether the particular right of way in question was in fact occupied or enjoyed or reputed as appurtenant to Roseville. Mr. Herschell says that, where a man is occupier of two adjoining pieces of land, and uses both for the convenience of himself as the actual occupier of both, anything that he may do on the one is *prima facie* not a right appurtenant to the other, and would not pass as appurtenant; and that when he passes across the one close to the other, he exercises the right of going from one to the other merely for his convenience as occupier of the two, and that he does not *prima facie* enjoy or occupy the way as appurtenant to the other, and that the way would not pass as a right enjoyed or as appurtenant. But though that may *prima facie* appear to be the case; yet if there be acts of ownership and user of a road by a man across land for the enjoyment and exclusive convenience of himself as occupier of the adjoining lands, notwithstanding the cases cited, I do not think, in point of law, we can say that the fact of a road having been so enjoyed and occupied only during the time he had unity of possession or unity of seisin prevents it being enjoyed as appurtenant.

The first case relied on for the defendant is *Thomson v. Waterlow*, Law Rep. 6 Eq. 36, 41, before the late Master of the Rolls; and I cannot help thinking that he must have been misunderstood. He is reported to have said: "There is, as it appears to me, a distinction

between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties." I quite agree that there is a distinction. The way which had existed previously to the unity of possession, and which still continued to exist, is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way it would require to be seen whether it had been so used and enjoyed. Then the Master of the Rolls continues: "I do not think that the judges in *James v. Plant*, 4 Ad. & E. 749, intended to lay down that such words of conveyance as were used in that case and in the present would constitute the grant of a right of way, where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place." Taking that as the rule to be applied as to matter of fact, I think it is a sound one. I think whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used or enjoyed as appurtenant to the premises — it was used for the convenience of the man who was the occupier of the two, and when he ceases to be the occupier of the two, I think it is no longer appurtenant. That, I think, is a sound rule. And though the facts of the case before the late Master of the Rolls are not set out, I presume they were such as to show that the right of way said to pass was for the convenience of the person so long as he was the occupier of the whole premises to which and over which the way went. Looking at it in that view, it would seem to have been a sound enough decision.

In *Langley v. Hammond*, Law Rep. 3 Ex. 168, the Lord Chief Baron is reported to have laid it down as matter of law: "Since it does not appear here that at any antecedent time," that is, before the unity of possession, "there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words" (together with all ways used or enjoyed therewith) "cannot make or revive a right of way that never before existed." And then he goes on to cite what I have read from the judgment of the Master of the Rolls in *Thomson v. Waterlow*, Law Rep. 6 Eq. 41. No doubt the Lord Chief Baron so lays down the law; and if that had been the decision of the Court of Exchequer, we should have been bound by it, and we must have left the question whether it was right or no for the Court of Error. But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right. If the words, as my Brother Lush suggested in the course of

the argument, had been "together with the right of way which Green *de facto* has enjoyed of passing over the private farm road," supposing that had been a right of way never enjoyed as of right, but merely a way *de facto* used, still I think the words would have clearly enough created a right of way. I quite agree, where there is a track across the middle of a stack-yard, and the owner sold one side of the stack-yard to enable the purchaser to throw it into his pleasure-grounds, that track across the middle of the stack-yard would not, to use the words of the Master of the Rolls, be a right of way appurtenant to every portion of the stack-yard, but a right of way solely for the convenience of the person who held the whole stack-yard, and which convenience ceased to exist when he severed one part of the stack-yard from the other. That is a good and sound distinction, and taking it in that way, which is the point Martin, B., went upon, I think the decision is perfectly good and right. As to the Lord Chief Baron's *dictum*, I do not think that what the Master of the Rolls said amounted to so much; but if it did, we have the *dicta* of the Lords Justices James and Mellish in *Watts v. Kelson*, Law Rep. 6 Ch. Ap. 172, 174, showing that they do not agree in the doctrine. It cannot make any difference in law, whether the right of way was only *de facto* used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right *de novo*, in the other merely revived. But it makes a great difference, as matter of evidence on the question, whether the way was used and enjoyed as appurtenant.

We have now to apply this to the facts of the present case. As a matter of evidence we find it stated in the case that Hudson, the then tenant of Roseville, who held on a lease for ten years, made a hay-loft, with two large openings to admit the hay, which could not be used except by bringing the hay in carts below them along the farm road, and these openings, though not absolutely essential to the use of the hay-loft, were extremely important and material for the use of it. Before Hudson built the loft and made these openings, he applied to the defendant, the freeholder of the farm and landlord of Roseville, and obtained his consent to the alterations being made; and at the same time Hudson asked and obtained leave to use the private farm road in question to get the hay and straw in carts to his hay chamber. Hudson remained in occupation of Roseville until March, 1863, when he sublet to Mrs. Fletcher, who remained in occupation twelve months; and on her quitting, Hudson sublet to Green, who remained in occupation up to the expiration of the lease, and was in actual occupation and using the defendant's farm road as Hudson had done, to get hay, straw, and corn into the loft, at the time when the plaintiff purchased Roseville from the defendant. I do not think it necessary to consider whether or not that parol license,

which was given by the defendant to use the road, was revocable; or whether an action might not have been maintained for obstructing the tenant in doing that which he had a parol license to do; or whether an action of trespass could have been brought against the tenant for using that road. I do not think it material to decide that. The license was not in fact revoked. The tenant for the time being of Roseville continued to use the road as appurtenant to it, and had the apparent necessity of using it for the purpose of getting to the two large openings in the loft, exactly in the same way as if the consent of the defendant had been in writing, and a wafer stuck on it. There would not have been the slightest difference in the use and enjoyment of the road. In the one case it would have become appurtenant, and in the other case it would only have been enjoyed as if it were appurtenant. I think in considering the words, we should see what they really mean, and apply them to the state of circumstances existing at the time of the conveyance; and I think this right to carry hay and straw to these two openings was in point of fact then occupied, and enjoyed, and reputed as appurtenant to these premises; and therefore that the plaintiff is entitled to judgment.

LUSH, J. I am of the same opinion. The only question is whether the words of this conveyance manifest an intention that the mode of access which had been used by the tenant of Roseville to the hay loft for the purpose of conveying fodder there, should pass to the plaintiff under that conveyance as a right of way. It is beyond doubt, as a fact, that during the subsistence of the lease, the tenant and his successors had used this way for the purpose of conveying hay and straw, &c., to the hay loft. It was the only mode of access to these openings, and it existed up to the time when the purchase was made by the plaintiff. The conveyance of the house and stable, together with the other premises, has these words, "Together —" [The learned judge read the clause]. The latter words were clearly intended to pass, if there were any such thing enjoyed, something not strictly appurtenant to the premises, which could not have been claimed as a matter of right without these larger words. Applying that to the facts as they existed at the time of the conveyance, there was a way which had been used by the tenant for the time being as a mode of access to a part of the premises, namely, the hay loft, and which had been used and enjoyed as if that way had been appurtenant to it, and the language used, I think, expresses, when you come to apply it to the facts, the intention to pass this right of way as specifically as if the conveyance had said "including all the ways and easements to the hay loft as the same have been heretofore enjoyed by Green." That undoubtedly would have passed this way. I certainly was struck with the observation of Mr. Herschell, that in none of the reported cases does it appear that the way claimed and held

to pass had been newly created as a right by the deed in question. Mr. Herschell says that in all the cases it appears (and certainly the note in 2 Wms. Notes to Saund. p. 809 n. (c) does justify that position) that there had been originally a right of way appurtenant to the premises which had been suspended, but not extinguished by unity of possession; and the question in all the cases was whether the general words used in the conveyance were intended to revive the right. I certainly was struck with that observation, because I have an impression even now, that there are cases to be found in which rights of way have been thus created by deed. But however that may be, I cannot see anything to prevent the acquisition of such a right by the words used in the present instance. I do not think that we are at all acting in conflict with the decision of the late Master of the Rolls in *Thomson v. Waterlow*, Law Rep. 6 Eq. 36. That case is obscurely stated, but I collect from the terms of the judgment that there had been no specific defined portion of the soil appropriated by the owner as a roadway to the severed property as appurtenant to it, but that he had been used to ride across one field in any direction he thought proper in order to get to another field. As to the case in the Exchequer of *Langley v. Hammond*, Law Rep. 3 Ex. 161, 168, 170, I think that case is rightly decided, although not on the ground put by the Lord Chief Baron. I prefer the ground on which my Brother Bramwell puts it. Looking, therefore, at the language used, I think it was intended to grant this right of way or access to the hay loft, just as if it had been expressed in terms that it was intended to pass the use of the road as the access to the hay loft, as it had been enjoyed by Green, who held the premises up to the time of the conveyance.

BLACKBURN, J. With regard to the observation on the older cases, I may add that in *Kooystra v. Lucas*, 5 B. & Al. 830, page 833, it does not appear affirmatively whether the right of way claimed had or had not been created before. The judges make no mention one way or the other; but the Chief Justice's direction was that the plaintiff was entitled to the right of way claimed for his cattle to the spot of ground on which he had built his stable and coach-house, "that being a part of the demised premises to which such a way had been used previously to 1814," the date of the conveyance. It might have been that the right of way existed before the unity of possession, but that is certainly not stated affirmatively.

*Judgment for the plaintiff.*¹

¹ See *Bradshaw v. Eyre*, Cro. El. 570; *Worledg v. Kingswel*, Cro. El. 794; *Barkshire v. Grubb*, 18 Ch. D. 616; *Bayley v. Gt. Western Ry. Co.*, 26 Ch. D. 434; *Baring v. Abingdon*, [1892] 2 Ch. 374, 389.

SECTION III

BY WORDS OF RESERVATION OR EXCEPTION.

WICKHAM v. HAWKER AND OTHERS

7 M. & W. 63. 1840.

PARKE, B.¹ This case was tried before my Brother Coleridge, at the last Summer Assizes at Winchester, when several points were reserved, which were fully argued before my Brothers Alderson, Gurney, and myself, at the sittings after Hilary Term.

It was an action of trespass *qu. cl. fr.* against the defendant Hawker and two others, for entering the plaintiff's closes, and hunting and searching for and killing game.

The special pleas were, first, that Vidler and Cox were seised of the manor of Bullington, in trust for Widmore, and that Widmore, Vidler, and Cox, by an indenture, in 1712, between them and Wade, and sealed by Wade, released parcel of the demesne lands of the manor of Bullington, comprising the *locus in quo*, to Wade, "excepting and always reserving to Widmore, Vidler, and Cox, their heirs and assigns, liberty, with servants or otherwise, to come upon the lands so conveyed, and there to hawk, hunt, fish, and fowl at any time thereafter, at their will and pleasure: and the said John Wade did thereby grant to Widmore, Vidler, and Cox, their heirs and assigns, the said liberty so excepted and reserved." The plea then states a release and conveyance from Vidler and Cox to Widmore of the manor and liberty, and deduces from him a title to both to the defendant Hawker, and he and the others, as his servants and in his company, justify the trespasses by virtue of the liberty.

The second special plea states, that the occupiers of the manor had used and enjoyed, and Hawker as such occupier was entitled to use and enjoy, the right of hunting, hawking, and fowling, for sixty years, by themselves and with servants.

The replication to the first plea takes issue on the allegation of a grant. That to the second denies the user and enjoyment. There was a new assignment of the trespasses committed by the two other defendants, by command of Hawker in his absence, in hunting, &c.; and pleas to the new assignment, — first, a reservation and grant of a liberty, in the like terms and by a similar deed to that in the second plea, to hunt, &c. *by* servants; secondly, a similar plea to the third, of sixty years' user, by the occupier and *by* servants.

The replication to the first plea to the new assignment denied the grant; to the second, denied the user and enjoyment.

The principal questions in the case were, how the issues raised by the replication to the first special plea to the declaration, and the

¹ The statement of facts is omitted, and part only of the opinion is given.

first plea to the new assignment, ought to be found; and that depends upon the legal effect of the deed of 1712.

The liberty "of hawking, hunting, fishing, and fowling," is, by the terms of that deed, "excepted and reserved to Widmore, Vidler, and Cox;" but so far as related to Widmore it could not be a good exception or reservation, because he was not a conveying party to the deed; nor is such a liberty, whether it be a mere easement or a profit *à prendre*, properly and in correct legal language, either an exception or a reservation. This point was expressly decided in the case of *Doe d. Douglas v. Lock*, 2 Ad. & Ell. 743, where most of the authorities were cited and fully considered. Lord Denman, in delivering the judgment of the court, says, "that the privilege of hawking, hunting, fishing, and fowling is not either a reservation or an exception in point of law; it is only a *privilege* or *right granted* to the lessor, though words of reservation and exception are used." As the indenture was executed by Wade, the words of reservation and exception operated as a grant by him to the three — Widmore, Vidler, and Cox, and the plea properly stated the legal effect of those words as a grant by him. Consequently this issue ought to have been found for the defendant, and the verdict must be entered accordingly.¹

¹ "The rent, heriots, suit of mill, and suit of court, are the only things which, according to the legal sense and meaning of the word, are *reservations*. For we are of opinion, that what relates to the privileges of hawking, hunting, fishing, and fowling, is not either a reservation or an exception in point of law; and it is only a privilege or right granted to the lessor, though words of *reservation* and *exception* are used. And we think, that what relates to the wood and the underground produce is not a *reservation*, but an *exception*. Lord Coke, in his Commentary on Littleton, 47 a, says, 'Note a diversity between an exception (which is ever of part of the thing granted, and of a thing *in esse*), for which, *exceptis, salvo, præter*, and the like, be apt words; and a reservation which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised.' In Shepard's Touchstone, p. 80, 'A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before:' and, afterwards, 'This doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before; so that this doth always reserve that which was not before, or abridge the tenure of that which was before.' And afterwards, 'It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing.' And afterwards, 'If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land or of a common, or other profit to be taken out of the land; these reservations are void.' In Brooke's Abridgment, title Reservation, pl. 46, it is said, that if a man leases land, reserving common out of it, or the herbage, grass, or profits of the land demised, this is a void reservation, for it is parcel of the thing granted, and is not like where a man leases his manor and the like, except White Acre, for there the acre is not leased; but here the land is leased; therefore the reservation of the herbage, vesture, or the like, is void. It must be observed, however, that, though in Co. Lit. 47 a, the distinction between a reservation and an exception is pointed out,

yet in p. 143 a, speaking of the word *reservation*, Lord Coke says, 'Sometime it hath the force of *saving* or *excepting*. So as sometime it serveth to reserve a new thing, viz., a rent, and sometime to except part of the thing *in esse* that is granted.' He does not, however, go on to illustrate that position; and as, only two pages before, in 142 a, he had said to the same effect as he had done in the former reference in 47 a, that 'a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant,' we cannot take this language of Lord Coke in 143 a, as identifying an exception and a reservation.

"There are, however, some cases reported, where, in the language of the court, the word 'reserve' is treated as meaning 'exception,' as in Dyer, 19 a, Pl. 110. That, however, is only general language; and it does not make them the same in point of law. In the very late case of *Fancy v. Scott*, 2 Man. & Ry. 335, the defendant pleaded that the plaintiff was tenant to the defendant of the close in which, &c., subject to a reservation to defendant of all pits in the close, with liberty to carry away the produce of the pits; and Mr. Justice Bayley said it was not a *reservation*, but an *exception*, and held the plea bad; and the counsel for the defendant did not further press the argument.

"It may be said, however, that, if the person who creates the power uses the word 'reserving' in such a way as to make an exception a reservation, it must be so taken; but we think not necessarily. Powers in many respects are construed so very strictly, that they must be so throughout.

"But, besides, it is not necessarily to be taken that what relates to the wood and underground produce is a reservation; there are other legal reservations, besides *rent*, to satisfy the words '*rent and reservations*;' and when the testator, in the lease of 1756 mentions wood and underground produce, he says *except and always reserved out of this present demise and grant*, all, &c.; and therefore if, in point of law, the matters are the subject of exception, they must be applied to the legal term used. And in *The Earl of Cardigan v. Armitage*, 2 B. & C. 197, where Sir Thomas Danby enfeoffed the Earl of Sussex of certain closes, *except and always reserved out of the said feoffment to the said Sir Thomas all the coals in all or any of the said lands, together with free liberty to sink and dig pits, &c.*, Mr. Justice Bayley, in delivering the judgment of the court upon the pleadings, says, this constituted an exception; and he states the distinction between an *exception* and a *reservation*, and then he goes on to point out the effect of an exception upon the statement in the pleadings.

"Upon all these authorities, we are of opinion that what is said as to the wood and underground produce is not a *reservation*, but an *exception*." — *Per LORD DENMAN*, C. J., in *Doe d. Douglas v. Lock*, 2 A. & E. 705, 743-746 (1835).

"It is to be observed that a right of way cannot, in strictness, be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of a grant from the grantee or lessee, in the same manner as a right of sporting or fishing, which has been lately much considered in the cases of *Doe d. Douglas v. Lock*, 2 A. & E. 705, and *Wickham v. Hawker*, 7 M. & W. 63. It is not indeed stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of a grant from the lessee; but we presume that in fact the deed was, according to the ordinary practice, executed by both parties, lessee as well as lessors." — *Per TINDAL*, C. J., in *Durham R. R. Co. v. Walker*, 2 Q. B. 940, 967.

See *Dawson v. Western Rd. Co.*, 107 Md. 70, 93.

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ASHCROFT v. EASTERN R. R. CO.

126 Mass. 196. 1879.

BILL in equity, filed June 13, 1878, alleging that, on October 26, 1837, John Lovejoy conveyed to the defendant a parcel of land in Lynn, over which its railroad has been located, consisting of a strip twenty-eight feet in width; that said parcel has ever since been owned and used by the defendant; that, by the terms of the deed, Lovejoy created and reserved, for the benefit of his adjoining land, an easement in the land, namely, the right to receive water from a spring by aqueduct logs, through a culvert across the land conveyed to the defendant, on to the adjoining land which was then owned by Lovejoy; that the plaintiff by mesne conveyances, had become the owner of said adjoining land and buildings of Lovejoy, for the benefit of which the easement was reserved, which easement was conveyed with the land; that Lovejoy and his grantees, including the plaintiff, have used, without interruption or objection on the part of the defendant, the culvert and aqueduct for more than twenty years prior to the acts of the defendant hereinafter complained of; that the premises belonging to the plaintiff have been used for many years for morocco and tanning business, requiring a large supply of pure water, which, prior to the acts hereinafter complained of, has always been supplied by the aqueduct running through the culvert under the railroad; that in August, 1870, the defendant caused the culvert, under which the aqueduct logs were laid, to be filled with rocks and other obstructions, the weight and force of which crushed the logs, so that the water, which should have been conducted by them into and upon the premises of the plaintiff, overflowed, wasted and flooded said premises, and caused the tenant thereof to leave; that this overflow of water was adjudged by the Board of Health of Lynn to be a public nuisance, in consequence of which the plaintiff was obliged to lay a drain to conduct away the water at great expense; that while these obstructions were being put in, and since then, the plaintiff frequently protested to the defendant against its action, and has repeatedly notified the defendant of the interference with his easement and injury to his land, and has constantly demanded of it the restoration of his rights; but it has wholly neglected and refused to remove the obstructions and restore his rights; that, in consequence of these acts of the defendant, the plaintiff is wholly deprived of the use and enjoyment of the aqueduct and the water therefrom, and has been prevented from carrying on his business; that the defendant is insolvent and unable to pay its debts in full, and all of its property is mortgaged to creditors for a much larger sum than its value, although the defendant is still in the legal possession of the property, and it has no property which can be come at to be attached or taken on exe-

cution in an action at law; that the acts of the defendant are an appropriation of a privilege, right and easement appurtenant to the plaintiff's land, of a continuous and permanent nature; and that the plaintiff has not a plain, adequate, and complete remedy at law.

The prayer of the bill was that the defendant might be ordered to remove the obstructions, and to restore the aqueduct to its usual and former condition; that it might be decreed to pay to the plaintiff a sum of money sufficient to compensate him for the damage done; that it might be perpetually restrained from obstructing or in any way interfering with the plaintiff's aqueduct; and for further relief.

The defendant filed a plea alleging that the reservation in the deed of John Lovejoy to the defendant, dated October 26, 1837, was in the words following, and not otherwise: "Reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company; which culvert shall cross the railroad at right angles with the southeasterly line of John Alley, 3d's land, seventy-four feet west of the northeasterly line of my land, measuring on the centre of the railroad;" and also alleging that John Lovejoy died on September 12, 1876.

Hearing before *Ames*, J., upon the bill and plea, who reserved the question of the sufficiency of the plea for the determination of the full court.

MORTON, J. The plaintiff's right to maintain this suit depends upon the construction of the clause in the deed recited in the defendant's plea.

We are of opinion that this clause must operate as a reservation, or by way of implied grant. The operation of an exception in a deed is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant; and whatever is thus excluded remains in him as of his former right or title, because it is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him. *Shep. Touchst.* 80. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

The clause we are considering does not merely reserve to Lovejoy a right of way and of maintaining aqueduct logs through the land granted. The privilege which the parties intended should vest in him was the right of passing and repassing, and of maintaining his aqueduct logs through a culvert to be built and kept in repair by the grantee. The provision that the grantee shall build and keep in repair the culvert is an essential part of the grant, and clearly indicates that the intention of the parties was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception.

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It is well settled that, generally, the same rules of construction apply to a reservation or implied grant as to an express grant. In this case, the words used were, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert." This gave only an estate for life to Lovejoy. To create an estate of inheritance by deed to an individual, the land must be conveyed to the grantee and his heirs, and these necessary words of limitation cannot be supplied by other words of perpetuity. As stated by Wilde, J., in *Curtis v. Gardner*, 13 Met. 457, "a grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life." See also *Dennis v. Wilson*, 107 Mass. 591.

It is not necessary to decide whether the easement created by the reservation was appurtenant to the remaining land of Lovejoy. Assuming it to have been so, this could not have the effect to extend its duration. Lovejoy might assign it, if appurtenant, by a deed of the remaining land, but it would expire with his life, whether assigned or retained by him.

It follows from these considerations, that this bill cannot be maintained. Lovejoy having died before this suit was commenced, the easement had ceased to exist, and the plaintiff is not entitled to the relief prayed for in the bill. The defendant's plea, therefore, is sufficient.

*Bill dismissed.*¹

DEE v. KING

77 Vt. 230. 1905.

APPEAL IN CHANCERY. Heard on master's report and exceptions thereto at the March Term, 1904, Franklin County, *Start*, Chancellor. Decree dismissing bill. The orator appealed.

This case has been once before in the Supreme Court, and the decree was reversed *pro forma* for the reason stated in the opinion in this case. See 73 Vt. 375, for further statement of the facts involved.

WATSON, J. When this case was here before (73 Vt. 375) the decree was reversed *pro forma* and the cause remanded for additional

¹ And see *Kister v. Reeser*, 98 Pa. 1.

If the statute allows a fee simple to be created without the use of the word "heirs," a perpetual easement may be "reserved" without employing it. *Ruhnke v. Aubert*, 58 Oreg. 6; *Forde v. Libbey*, 22 Wyo. 464. See *Karmuller v. Krotz*, 18 Iowa 352. *Contra*, *Ross v. McGee*, 98 Md. 389.

The Massachusetts decisions are: *Bowen v. Conner*, 6 Cush. 132; *Dennis v. Wilson*, 107 Mass. 591; *Bean v. French*, 140 Mass. 229; *White v. N. Y. & N. E. Rd. Co.*, 156 Mass. 181; *Claflin v. B. & A. Rd. Co.*, 157 Mass. 489; *Hamlin v. N. Y. & N. E. Rd. Co.*, 160 Mass. 459; *Bailey v. Agawam Bank*, 190 Mass. 20; *Foster v. Smith*, 211 Mass. 497; *Childs v. B. & M. Rd. Co.*, 213 Mass. 91.

findings of fact by the special master, as to the time when, with reference to March 16, 1882, Jared Dee asked and obtained permission of the defendant to cross his three-acre piece of land on the east side of the Central Vermont Railroad. On the hearing before the master for this purpose, the orator introduced no further evidence. The defendant testified in his own behalf, and from his testimony the fact is found that Jared Dee first asked and obtained of the defendant permission to cross that land in January, 1882. The orator seasonably objected and excepted to the defendant's testifying to any conversation between him and Jared Dee on this point, because Jared Dee was dead.

The defendant was called and used as a witness by the orator at the first hearing, upon the question, among other things, whether Jared Dee passed through and over the three-acre piece, his habit and custom in so doing, to what extent, under what circumstances, and for what purpose. The orator made the defendant a general witness upon that question, and he thereby waived the statutory incompetency of the defendant as a witness, — *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; *Ainsworth v. Stone*, 73 Vt. 101, 50 Atl. 805, — and he could not afterwards complain because the defendant gave testimony in his own behalf more fully upon the same subject matter.

Jared Dee having obtained permission of the defendant to cross the three-acre piece within fifteen years next after March 16, 1867, the orator can have no prescriptive way over it. A right of way over this land is neither set forth nor claimed by the orator in his bill; yet in one aspect of the case whether he has such a way is material.

The only right of way claimed by the orator over the defendant's land so far as appears by the bill, is over the one-half-acre piece on the west side of the Central Vermont Railroad, as reserved by Jared Dee in his deed dated October 7, 1862, conveying that land to William W. Pettingill. In that deed immediately following the description of the land conveyed is the clause "reserving the privilege of a pass from the highway past the house to the railroad in my usual place of crossing." The defendant contends that these words are only a reservation of a personal privilege to Jared Dee which could not pass to his heirs or assigns because no words of inheritance or assignment were used in connection therewith; while the orator contends that the clause has the force of an exception, and that the servient estate thereby created passed to the subsequent owners of the dominant estate without such words of limitation being used. Much depends upon the construction given in this regard, in the disposition of the case. Lord Coke says that "reserving" sometimes has the force of saving or excepting, "so as sometime it serveth to reserve a new thing, viz. a rent, and sometime to except part of the thing in esse that is granted." Co. Litt. 143 a. Sheppard says that "a reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor,

etc., doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly, succeed the tenendum, . . . This part of the deed doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time, but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before, so that this clause doth always reserve that which was not before, or abridge the tenure of that which was before." Shepp. Touch. 80. Again the same author says, that an exception clause most commonly and properly succeeds the setting down of the things granted; that the thing excepted is exempted and does not pass by the grant. p. 77. The same principles were largely laid down by this Court in *Roberts v. Robertson*, 53 Vt. 690. There the deed given by the plaintiff contained a specific description of the land conveyed, and a clause "reserving lots . . . 32, 33," etc. Under this clause the plaintiff claimed title to the two lots above named. The court, after stating the offices of an *exception* and of a *reservation* the same as above, said these terms, as used in deeds, are often treated as synonymous and that words creating an exception are to have that effect, although the word reservation is used. It was held that the clause should be construed as an exception.

In England it has been held that a right of way cannot in strictness be made the subject of either an exception or a reservation; for it is neither parcel of the thing granted, an essential to an exception, nor is it issuing out of the thing granted, an essential to a reservation. *Doe v. Lock*, 2 Ad. & E. 705; *Durham, Etc. R. R. Co. v. Walker*, 2 Q. B. 945. But there, as in this country, *quasi*-easements are recognized in law, such as a visible and reasonably necessary drain or way used by the owner of land over one portion of it to the convenient enjoyment of another portion, and there has never been any separate ownership of the *quasi*-dominant and the *quasi*-servient tenements. As such easement, a drain is classed as continuous, because it may be used continuously without the intervention of man; and a right of way as non-continuous because to its use the act of man is essential at each time of enjoyment. In *Barnes v. Loach* (1879), 4 Q. B. D. 494, it was said regarding such easements of an apparent and continuous character, that if the owner aliens the *quasi*-dominant part to one person and the *quasi*-servient to another, the respective alienees, in the absence of express stipulation, will take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to them. And in *Brown v. Alabaster* (1888), 37 Ch. D. 490, it was said that although a right of way by an artificially formed path over one part of the owner's land for the benefit of the other portion, could not be brought within the definition of a continuous easement, it might be governed by the same rules as are apparent and continuous easements.

Cases involving *quasi*-easements have been before this Court. In *Harwood v. Benton & Jones*, 32 Vt. 724, the owner of a water privilege, dam, and mill, also owned land surrounding and bordering upon the mill pond and mill, which he subjected to the use and convenience of the mill privilege and mills. A part of these adjacent lands thus subjected was conveyed without any stipulation in the deed that any servient condition attached thereto. The condition of the estate had been continuous, was obvious, and of a character showing that it was designed to continue as it had been. The Court said this was a palpable and impressed condition, made upon the property by the voluntary act of the owner. It was held that without any stipulation in the deed upon that subject, the law was that the grantee took the land purchased by him, in that impressed condition, with a continuance of the servitude of that parcel to the convenience and beneficial use of the mill. It was there laid down as an unquestioned proposition that "upon the severance of a heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements;" and that the doctrine was equally well settled that the law will imply a reservation of like easements in favor of the part of the inheritance retained by the grantor. In *Goodall v. Godfrey*, 53 Vt. 219, a "visible, defined way in use for the obvious convenience of the whole building" was in question, consequent on a division of the property among the representatives of the deceased owner, and the same principles of law were applied. And in *Willey, Admx. v. Thwing*, 68 Vt. 128, 34 Atl. 428, applying the same doctrines, a right of way was upheld under an implied reservation.

In this country it is commonly held that a way may be the subject of a reservation, and in many cases courts of high standing have held that it may properly be the subject of an exception in a grant. While it is true that an owner of land cannot have an easement in his own estate in fee, he may as before seen have a *quasi*-easement over one portion in the character of a visible, travelled way reasonably necessary to the convenient enjoyment of another portion, and when such a way exists, there would seem to be no substantial legal reason why it may not be treated as a thing in being, and as a part of the estate included in the description of the grant be made an exception in a deed of the land over which the way is, when such appears to have been the intention of the parties. That this is the principle upon which a clause reserving a way is construed as an exception appears from *Chappell v. N. Y., N. H. & H. R. R. Co.*, 62 Conn. 195, which is more particularly referred to later. There the Court said: "Then too the right to cross was, in a certain sense, a right existing in the grantors at the date of the deed. It was a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be,

in effect, conferred upon them by the grantees. It was something which the 'reservation' in effect 'excepted' out of the operation of the grant."

The distinction between a reservation and an exception of a way is best understood by an examination of cases involving clauses very similar to the one here under consideration, yet so unlike as to require different constructions in this regard. In *Ashcroft v. Eastern R. R. Co.*, 126 Mass, 196, 30 Am. Rep. 672, the clause was "reserving to myself the right of passing and re-passing, and repairing my aqueduct logs forever, through a culvert . . . to be built and kept in repair by said company; which culvert shall cross the railroad at right angles," etc. It was held that the provision that the grantee should build and keep in repair the culvert was an essential part of the grant, and clearly indicated that the intention of the parties was to confer upon the grantor a new right not before vested in him, which, therefore, could not be the subject of an exception. In *Clafin v. Boston & Albany R. Co.*, 157 Mass 489, 20 L. R. A. 638, the clause was "reserving to ourselves the right of a passage way to be constructed and kept in repair by ourselves." There was no evidence of an existing way across the land. It was held to be a reservation and not an exception. In *Chappell v. N. Y., N. H. & H. R. R. Co.*, before cited, John W. and Benjamin F. Brown, in 1851, owned a piece of land in New London fronting on the river Thames and lying between that river and Bank street. On the river front was a wharf and docks. Between the wharf and Bank street was about one and one-half acres used by the Browns in carrying on a coal and wharfage business. The wharf was valuable. In that year the Browns conveyed, for railroad purposes, a strip of this land, twenty-five feet wide, running through the land and separating the wharf from the land lying westerly of the strip conveyed, and rendering it inaccessible except by crossing the strip. This right of crossing was indispensable to the Browns and all who might thereafter own the premises then owned by them. The deed thus conveying this strip contained the clause "And we reserve to ourselves the privilege of crossing and recrossing said piece of land described, or any part thereof within said bounds." The way at the time of the date of the deed was an existing one plainly visible, necessary, and in almost constant use. The clause was construed to be an exception. In *Bridger v. Pierson*, 45 N. Y. 601, the defendant conveyed land to the plaintiff and immediately following the description the deed contained the clause "reserving always a right of way as now used on the west side of the above described premises . . . from the public highway to a piece of land now owned by" R. It was held to be an exception. In *White v. N. Y., & N. E. R. R. Co.*, 156 Mass. 181, the action was tort for the obstruction of a private way claimed by the plaintiff over the location of the defendant's railroad, under a clause in a deed

which read "reserving the passway at grade over said railroad where now made." This way had existed as a defined roadway or cart track, and had been used in passing to and from a highway to and from parts of the lot north of the tracks before the railroad was located, and before the deed referred to was given. The clause was held to be an exception. These are but a few of the many decisions in different jurisdictions which might be referred to upon this question, but more are unnecessary.

The language of the clause under consideration cannot be said to be unequivocal. We therefore look at the surrounding circumstances existing when the deed containing it was made, the situation of the parties, and the subject matter of the instrument; and in the light thereof the clause should be construed according to the intent of the parties. At the time of making this deed Jared Dee was the owner of land on the opposite side of the railroad, consisting of a three-acre piece of tillage land, and a hill lot adjoining it on the north, chiefly valuable for its sugar works, for its pasturage, and as a wood and timber lot. The last named lot is traversed its entire length from north to south and about a third of its width from west to east by a considerable hill, more or less ledgy and making it extremely inconvenient to cross from the grantor's own land north of the Fairbanks land, but easily reached by the now disputed right of way across the one-half-acre piece, and over the three-acre piece of tillage land. The greater portion of Jared Dee's sugar orchard, timber, and wood was on top and east of this hill. There was no way to or out of the hill lot except over the hill on Jared Dee's own land west of the Fairbanks land, or out through the three-acre piece, and the one-half-acre piece onto the public highway leading westerly to Jared Dee's house. For more than ten years next prior to the time when Jared Dee gave the deed to Pettingill, the Dees had passed over the one-half-acre piece and through the three-acre piece almost exclusively for all purposes whenever they went to or from the hill lot, whether with team, on foot, or in any other manner, except when they got wood on the west side of the lot they went from the highway across the Fairbanks farm west of the railroad, thence over the railroad at the "middle crossing" onto the hill lot. And on rare occasions they used still another route further north wholly over Dee's land. It appears from the deed itself that in crossing the one-half-acre piece they had a particular place of travelling then known to both the grantor and the grantee, for the words used in the deed describing it are "from the highway past the house to the railroad *in my usual place of crossing*." Thus showing the intention of the parties to be that the grantor should retain the right to pass through this land over a visible, travelled way then in existence, and that no new way was thereby being created for his benefit.

Clearly under the law and in the light of the foregoing circum-

stances, the clause must be construed, not as a reservation, but as an exception. When given this construction, technical words of limitation are not applicable, for the part excepted remained in the grantor as of his former title, because not granted. *Cardigan v. Armitage*, 2 Barn. & C. 197; *Chappell v. N. Y., N. H. & H. R. R. Co.*, before cited; *Winthrop v. Fairbanks*, 41 Me. 307. We think the parties intended that by this provision the grantor should permanently retain from the grant for the benefit of his land east of the railroad, the way over the one-half-acre piece, which he had been accustomed to use in crossing that land to and from the land first named. The way, thus retained became an easement over the half-acre piece of land and an appurtenant to the other land; and with the latter it would pass by descent or assignment.

Subsequent to conveying the one-half-acre lot to Pettingill, Jared Dee sold and conveyed the three-acre piece, which through mesne conveyances has become the property of the defendant. But this cannot affect the easement as an appurtenant to the hill lot; for a right of way appurtenant to land attaches to every part of it, even though it may go into the possession of several persons. *Lansing v. Wiswall*, 5 Denio, 213; *Underwood v. Carney*, 1 Cush. 285.

The master finds that if upon the facts reported the orator has a right of way or a right to cross over defendant's land to the hill lot, then the orator has suffered damage by reason of the acts of the defendant complained of in the bill, to the amount of sixty-five dollars. The orator can recover only such damages as he has suffered by acts of the defendant in obstructing the way across the one-half-acre piece, considering the fact that the orator had no right of way over or right to cross the defendant's three-acre piece. Upon this basis the damages have not been assessed. The report should therefore be recommitted for that purpose, and upon such damages being reported, a decree should be rendered that the injunction be made perpetual, and that the defendant pay to the orator the damages found with costs in this Court. The costs in the court below should be there determined.

The decree dismissing the bill with costs to the defendant is reversed and cause remanded with mandate.¹

¹ See *New Haven v. Hotchkiss*, 77 Conn. 168; *Ring v. Walker*, 87 Me. 550; *Bridger v. Pierson*, 45 N. Y. 601.

In the following cases the easement created in the grantor by the conveyance was, even in the absence of the words "heirs" or "assigns," held not personal to him. *Webb v. Jones*, 163 Ala. 637; *Chappell v. N. Y. N. H. & H. R. R. Co.*, 62 Conn. 195; *Kuecken v. Voltz*, 110 Ill. 284; *Teachout v. Capital Lodge*, 128 Iowa 380; *Engel v. Ayer*, 85 Me. 448; *Lathrop v. Elsner*, 93 Mich. 599; *Emerson v. Mooney*, 50 N. H. 315; *Borst v. Empie*, 1 Seld. (N. Y.) 33; *Smith v. Jones*, 86 Vt. 258.

HAVERHILL SAVINGS BANK v. GRIFFIN

184 Mass. 419. 1903.

BILL IN EQUITY, filed August 17, 1901, to restrain the defendant from using and maintaining a drain from certain land on the east side of Auburn Street, in Haverhill, owned by the defendant, through land on the south side of Sixth Avenue in that city owned by the plaintiff, and praying that the plaintiff be authorized to close the portion of the drain upon its land.

In the Superior Court *Stevens*, J. made a decree granting the relief prayed for; and the defendant appealed. At the request of the defendant the judge reported the material facts found by him, in accordance with R. L. c. 159, § 23.

The report was in substance as follows: The defendant is the owner of the land described as hers in the bill, bounded on the north by the land of the plaintiff also described in the bill. Both parcels of land were owned on and before November, 1885, by one Algernon P. Nichols, who had died before the filing of the bill. The land owned by the defendant was conveyed to her by Nichols by a warranty deed in common form dated November 4, 1885. The land owned by the plaintiff was conveyed to one Warren Hoyt by Nichols, by a warranty deed in common form dated July 12, 1886. In this deed the plaintiff's land was described as bounded on the south by land of Caroline Griffin about one hundred and seven feet more or less, and contained the following clause: "And reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land." The plaintiff acquired its title through a mortgage given by Hoyt to the plaintiff and foreclosed by the plaintiff. The mortgage did not contain any words relating to the drain. After the conveyance to the defendant, a drain was constructed by her from the lot owned by her into and through the Nichols land, afterwards conveyed to Hoyt. This drain connected with the sewer on Hoyt's land, and from the autumn of 1885 was in continuous use draining the defendant's lot.

The deed from Nichols to Hoyt containing the clause above quoted was as follows, omitting the portion after the habendum clause which contained the ordinary covenants of a warranty deed:

"Know all men by these presents that I, Algernon P. Nichols of Haverhill in the County of Essex and Commonwealth of Massachusetts, in consideration of two thousand dollars paid by Warren Hoyt of said Haverhill, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Warren Hoyt a certain parcel of land in said Haverhill on the southerly side of Sixth street and bounded on the North by said St. one hundred

and ten feet more or less, on the east by land of the Children's Aid Society, about one hundred feet more or less, on the south by land of Caroline Griffin about one hundred and seven feet more or less, and on the West by Auburn street about one hundred feet. Saving and reserving nevertheless to myself and my heirs and assigns forever for the use of said Children's Aid Society a right to pass and repass upon and over a strip of land four feet (4 ft.) wide and seventy-five feet long, extending southerly from Sixth St. and next to land of said Society, so as to make a passage way for the exclusive benefit — the adjoining estates twelve feet wide including the eight feet in width which I reserved for such use in my deed to said Society, and reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land. To have and to hold the granted premises with all the privileges and appurtenances thereto belonging to the said Hoyt and his heirs and assigns to their own use and behoof forever."

BRALEY, J. At the time the defendant obtained title to her land the drain was not in existence and the deed under which she holds is silent as to any right to lay and maintain such a drain through the land of the plaintiff. Neither does it appear that this alleged right whereby the defendant would be entitled to connect her premises with the public sewer, can be said to arise by implication. See in this connection *Bumstead v. Cook*, 169 Mass. 410.

The case falls within the well recognized general rule that where an easement is not set out in the instrument under which the party claiming the privilege holds title, it must be shown to be actually in existence and connected with the estate conveyed in order to pass as appurtenant by implication. *Philbrick v. Ewing*, 97 Mass. 133; *Bass v. Edwards*, 126 Mass. 445, 449.

In order therefore to maintain her claim she is necessarily obliged to rely on the clause in the deed to the plaintiff's grantor which is in these words, "and reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land," and the rights of the parties must be determined on the construction to be given to this clause.

At the date of this deed so far as the facts appear by the record no such right had been granted to or prescriptively acquired by the defendant, and which might be preserved for her use by the language used, on the ground that thereby an exception was created and hence the easement claimed was excepted from the grant. But they must be construed as an attempt to vest in the grantor a new interest or right that did not before exist and therefore constitute a reservation rather than an exception. *Wood v. Boyd*, 145 Mass. 176; *White v. New York & New England Railroad*, 156 Mass. 181.

As the defendant was not a party but a stranger to the deed she could gain no rights under the reservation which enured solely to

the grantor, and for this reason she did not acquire an easement under it. *Murphy v. Lee*, 144 Mass. 371, 374.

It follows that the decree entered in the Superior Court was right and should be affirmed. *Decree affirmed.*¹

NOTE ON HABENDUM

"It was a well settled common-law rule of long standing that if the premises and *habendum* of a deed contain different express limitations of the estate which are repugnant to each other, the construction which is most beneficial to the grantee will be adopted. Pursuant to this rule the *habendum* where such repugnance occurs may enlarge an estate expressly contained in the premises, but may not abridge or make void any such estate. The clearest case for the application of this rule seems to have been where the premises contained an express grant of a fee simple by the use of the words 'to the grantee and his heirs,' while the *habendum* was 'to the grantee for life' or for a term of years. In such a case the grantee took the fee. From the English writers and cases it would appear that this rule was one of marked rigidity. If the premises expressly designated the fee and the *habendum* a life estate, no extended argument from the surrounding circumstances that the grantor meant a life estate would have been effective to prevent the creation of the fee. As Challis states it: 'The *habendum* cannot abridge any estate contained in the premises, unless such estate either is not expressly contained, or else is not capable of taking effect.' This he shows is the result of the authorities. The same rule has often been referred to by our [Illinois] Supreme Court." Kales, *Estates and Future Interests*, 2d ed., § 178.

And see *Anon.*, Moore 43 pl. 133; *Dowse's Case*, Cro. El. 25; *Windsmore v. Hubbard*, Cro. El. 58; *Kirkman and Reignold's Case*, 2 Leon. 1; *Altham's Case*, 8 Co. 148 a, 154 b; *Turnman v. Cooper*, Cro. Jac. 476; *Goodtitle d. Dodwell v. Gibbs*, 5 B. & C. 709; *Doe d. Timmis v. Steele*, 4 Q. B. 663; Co. Lit. 21 a, 299 a; *Elphinstone*, *Interp. of Deeds*, C. 14, Rule 66; Challis, *Real Prop.*, 3d ed., 411 *et seq.*; *Dickson v. Van Hoose*, 157 Ala. 459; *Yeager v. Farnsworth*, 163 Iowa 537; *Glenn v. Gross*, 185 Iowa 546; *Union Water Power Co. v. Lewiston*, 101 Me. 564, 579; *Dana v. Smith*, 114 Maine 262; *Putnam v. Pere Marquette R. Co.*, 174 Mich. 246; *Jones v. Whichard*, 163 N. C. 241; *Teague v. Sowder*, 121 Tenn. 132; *Pack v. Whitaker*, 110 Va. 122; *Culpeper Bank v. Wrenn*, 115 Va. 55; *Goodman v. Telfer*, 230 Mass. 157; *Hafner v. Irwin*, 4 Dev. & B. (N. C.) 433; *Tyler v. Moore*, 42 Pa. 374; *Bennett v. Bennett*, 93 Vt. 316. Compare Kales, *Estates and Future Interests*, 2d ed., §§ 179-182, where it is said that the common law rule has often not been followed in this country.

¹ Compare *Beinlein v. Johns*, 102 Ky. 570; *Tuttle v. Walker*, 46 Me. 280; *Herbert v. Pue*, 72 Md. 307; *Martin v. Cook*, 102 Mich. 267; *Whitelaw v. Rodney*, 212 Mo. 540; *Litchfield v. Boogher*, 238 Mo. 472; *Petition of Young*, 11 R. I. 636; *Bartlett v. Barrows*, 22 R. I. 642.

CHAPTER IX

COVENANTS FOR TITLE¹

PRELIMINARY NOTE ON THE USUAL COVENANTS²

SEISIN; RIGHT TO CONVEY. — Not satisfied by tortious possession. 2 Tiffany, Real Prop., 2d ed., § 450. But see *Wilson v. Widenham*, 51 Me. 566; *Marston v. Hobbs*, 2 Mass. 433; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Stambaugh v. Smith*, 23 Ohio St. 584. Compare *Eames v. Armstrong*, 146 N. C. 1.

Broken at once, if at all. *Simons v. Diamond Match Co.*, 159 Mich. 241, 248; *Hilliker v. Rueger*, 228 N. Y. 11; *Pridgen v. Long*, 177 N. C. 189. Compare *Kuntzman v. Smith*, 77 N. J. Eq. 30.

Damages are usually amount of consideration and interest from time of breach. *Mather v. Stokely*, 218 F. R. 764; *Wilson v. Forbes*, 2 Dev. (N. C.) 30, 39. Compare *Seyfried v. Knobland*, 44 Colo. 86; *Lloyd v. Sandusky*, 203 Ill. 621; *Crosby v. Evans*, 219 S. W. (Mo.) 948; *Pridgen v. Long*, 177 N. C. 189, 194; *Curtis v. Brannon*, 98 Tenn. 153.

INCUMBRANCES. — A covenant "that the premises are free from incumbrances" is broken at once, if at all. *Mixon v. Burleson*, 203 Ala. 84; *Musial v. Kudlik*, 87 Conn. 164. Compare *Unitarian Society v. Trust Co.*, 162 Iowa 389. But see *Estate of Hamlin*, 133 Wis. 140.

As to public highways as incumbrances, see cases collected in *Schwartz v. Black*, 131 Tenn. 360, 365.

Damages. For an incumbrance such as a mortgage, nominal till paid off. *Hasselbusch v. Mohmking*, 76 N. J. L. 691; *Smith v. Wahl*, 88 N. J. L. 623; *International Development Co. v. Clemans*, 59 Wash. 398. Then the amount paid to discharge the same. *Boice v. Coffeen*, 158 Iowa 705, 712. See *Hartman v. Stoll*, 205 Mich. 378; *Fishel v. Brown*, 145 N. C. 71, 80. For an incumbrance such as an easement, the diminished value of the premises. *Smith v. White*, 71 W. Va. 639; *Gadow v. Hunholz*, 160 Wis. 293. See *Fraser v. Bentel*, 161 Cal. 390; *Schwartz v. Black*, 131 Tenn. 360, where the easement benefited the premises granted. As to special damage, see *Musial v. Kudlik*, 87 Conn. 164.

FURTHER ASSURANCE. — This covenant is rarely used in the United States. Rawle, Covenants for Title, 5th ed., C. VII, and §§ 194, 195. See *Werner v. Wheeler*, 142 App. Div. (N. Y.) 358, 368.

QUIET ENJOYMENT. — The usual covenant in leases. Broken only on eviction. See Rawle, Covenants for Title, 5th ed., C. VI; Warranty, *infra*.

Damages. See Warranty, *infra*, and 3 Williston, Contracts, § 1404.

WARRANTY. — Broken when there is damage to covenantee. The usual breach is eviction by paramount title. *Musgrove v. Cordova Coal Co.*, 191 Ala. 419; *Smith v. Wahl*, 88 N. J. L. 623. But surrender to such title adversely asserted, *Hamilton v. Cutts*, 4 Mass. 349; *Herbert v. Handy*, 29 R. I. 543, 548; the buying in of it, *Joyner v. Smith*, 132 Ga. 779, *Loomis v. Bedel*, 11 N. H. 74, *Pee Dee Naval Stores Co. v. Hamer*, 92 S. C. 423 (compare *Dyer v. Britton*, 53 Miss 270); or failure to obtain possession by reason of the prior occupancy of a paramount owner, *Hunt v. Hay*, 214 N. Y. 478,

¹ See Rawle, Covenants for Title, 5th ed. The only matter with reference to covenants for title treated in the text is their running with the land.

² Many recent cases are collected in 2 Tiffany, Real Prop., 2d ed., §§ 449-455.

involves a breach. Compare *Copeland v. McAdory*, 100 Ala. 553 (public way); *Crawford County Bank v. Baker*, 95 Ark. 438 (title in the United States); *Burke v. Trabue*, 137 Ky. 580 (public wharf); *Walker v. Robinson*, 163 Ky. 618 (covenantor insolvent); *Harrington v. Bean*, 89 Me. 470 (private easement); *Sandum v. Johnson*, 122 Minn. (public way); *Eves v. Curtiss*, 38 Wash. 367 (no consideration given by grantee); *McDonald v. Ward*, 99 Wash. 354 (right of way of railroad).

In *Biwer v. Martin*, 294 Ill. 488, A by deed with covenant of warranty created in land a life estate in himself, remainder to his son B for life, remainder to his son's widow for life, remainder to B's descendants surviving B in fee. X acquired the life estates, and Y the reversion of A. Y then transferred the reversion to X with the expressed intention of destroying by merger the contingent remainder in fee. Held, that Y was estopped by the covenant of warranty in the original deed of A, his predecessor in title, from destroying the contingent remainder. See 34 Harv. L. Rev. 430, 518; 15 Ill. L. Rev. 583, 586.

If the covenantee gives notice of suit brought against him by the owner of the paramount title, and requests the covenantor to defend it, he is relieved from being obliged afterward to prove the validity of the adverse claim. *Taylor v. Allen*, 131 Ga. 416; *Ballou v. Clark*, 187 Iowa 496; *Chamberlain v. Preble*, 11 All. (Mass.) 370; *Estep v. Bailey*, 94 Oreg. 59; *Farwell v. Bean*, 82 Vt. 172; *Morgan v. Haley*, 107 Va. 331. Compare *Rennie v. Gibson*, 75 Okla. 282. Form of notice. *Mason v. Kellogg*, 38 Mich. 132; *Miner v. Clark*, 15 Wend. (N. Y.) 425.

Damages. Generally consideration price, or in case of breach of the covenant as to part of the land only, a proportional part of such price, with interest. *Brawley v. Copelin*, 106 Ark. 256; *Eaton v. Hopkins*, 71 Fla. 615; *Yazoo Rd. Co. v. Banister*, 89 Miss. 808; *Merchant's National Bank v. Otero*, 24 N. M. 598; *Campbell v. Shaw*, 170 N. C. 186; *Mengel Box Co. v. Ferguson*, 124 Tenn. 433. Compare *Bass v. Starnes*, 108 Ark. 357; *Mayo v. Maxwell*, 140 Ark. 84; *Parker v. Cramton*, 143 Ga. 421; *Barker v. Denning*, 91 Kan. 485; *Beutel v. Am. Machine Co.*, 144 Ky. 57; *Wade v. Barlow*, 99 Miss. 33; *Allen v. Miller*, 99 Miss. 75; *Winn v. Taylor*, 98 Oreg. 556. Although the rule in some of the New England States is to the contrary, by the weight of authority increase in the value of the land by improvements or otherwise is disregarded. 2 Tiffany, Real Prop., 2d ed., p. 1709. Right to interest in relation to covenantee's liability to paramount owner for mesne profits. 2 Tiffany, Real Prop., 2d ed., p. 1713. The covenantee is entitled to expenses including attorney's fee incurred in defending a suit by the true owner, if he gives notice to the covenantor of the proceeding. *Beach v. Nordman*, 90 Ark. 59; *Ballou v. Clark*, 187 Iowa 496; *Helton v. Asher*, 135 Ky. 751; *Scott v. Scott*, 183 Ky. 604; *Olmstead v. Rawson*, 188 N. Y. 517; *Jones v. Balsley*, 154 N. C. 61; *Ellis v. Abbott*, 69 Oreg. 234. Expenses were allowed, although it did not appear that notice had been given in *Madden v. Caldwell Land Co.*, 16 Idaho 59, and in *Solberg v. Robinson*, 34 S. D. 55. Attorney's fee was not permitted to be recovered, because of failure of covenantee to notify covenantor of suit by owner of paramount title in *Smith v. Boynton Co.*, 131 Ark. 22. See *Jeter v. Glenn*, 9 Rich. L. (S. C.) 374, 380; *Turner v. Miller*, 42 Tex. 418.

That the grantee in a conveyance with covenants knows of a defect in the title at the time of the grant is held to be immaterial. *Mackintosh v. Stewart*, 181 Ala. 328; *Ericksen v. Whitescarver*, 57 Colo. 409; *Newmyer v. Rousch*, 21 Idaho 106; *Doyle v. Emerson*, 145 Iowa 358; *Cornelius v. Kinard*, 157 Ky. 50; *Callanan v. Keenan*, 224 N. Y. 503; *Joiner v. Ardmore Trust Co.*, 33 Okla. 266; *Sanders v. Boynton*, 112 S. C. 56; *O'Connor v. Enos*, 56 Wash. 448. Compare *Snadon v. Salmon*, 135 Ky. 47; *Eames v. Armstrong*, 146 N. C. 1.

A. *In General*

MIDDLEMORE v. GOODALE

Cro. Car. 503. 1639.

Covenant. Whereas the defendant by indenture enfeoffed J. S. of such lands, and covenanted for himself and his heirs with the feoffee, his heirs, and assigns, to make further assurance upon request; which lands J. S. conveyed to the plaintiff, who brings this action, because the defendant did not levy a fine upon the plaintiff's request.

The defendant pleaded release from the said J. S. with whom the first covenant was made, and it was dated after the commencement of this suit; and thereupon

The plaintiff demurred.

And all the court agreed, that the covenant goes with the land, and that the assignee at the common law, or at leastwise by the Statute, shall have the benefit thereof.

Secondly, they held, that although the breach was in the time of the assignee, yet if the release had been by the covenantee (who is a party to the deed, and from whom the plaintiff derives) before any breach, or before the suit commenced, it had been a good bar to the assignee from bringing this writ of covenant. But the breach of the covenant being in the time of the assignee, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee cannot release this action wherein the assignee is interested. Whereupon rule was given, that judgment should be entered for the plaintiff, unless cause was shown to the contrary by such a day.¹

BOOTH v. STARR AND OTHERS

1 Conn. 244. 1814.

THIS was a bill in chancery, brought to the Superior Court in Fairfield County; the facts stated in the bill and found by the court, were these. John Booth, in 1795, conveyed a lot of land in Hudson to Stephen Booth, the plaintiff, with the usual covenants of warranty and seisin. In 1802, the plaintiff conveyed the premises to one McKinstry; McKinstry afterwards conveyed to one Seymour; he conveyed to Thomas Williams; and he conveyed to Elisha Williams, Esq.; there being in each of the deeds the same covenants as in the deed first mentioned. At the time John Booth conveyed the premises, he was not the owner thereof in fee, but the title was in one

¹ See *Crooker v. Jewell*, 29 Me. 527; *Littlefield v. Getchell*, 32 Me. 390; *White v. Whitney*, 3 Met. (Mass.) 81, 83; *Chase v. Weston*, 12 N. H. 413; *Susquehanna Coal Co. v. Quirk*, 61 Pa. 328, 339.

Lucy Starr, who has since entered and evicted the last grantee; but the plaintiff has not been damnified. The respondents are the administrators of the estate and the heir at law, of John Booth, now deceased, and have his effects in their hands.¹ Upon these facts the respondents contended, that the plaintiff was not entitled to recover. But the court decided otherwise, and decreed the payment of the sum of 2340 dollars to the plaintiff, as damages sustained by him by reason of the aforesaid breach of covenant.

The respondents moved for a new trial, on the ground that the court mistook the law in making such decree. The question of law arising on the motion was reserved for the consideration of all the judges.

SWIFT, J. The question is, whether in the case of a covenant of warranty annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor, without having been sued by, or satisfied the damages to, the last covenantee, who has been evicted.

A covenant real is annexed to some estate in land; it runs with the land, and binds not only heirs and executors but assignees. Every assignee may, for a breach of such covenant, maintain an action against all or any of the prior warrantors, till he has obtained satisfaction. This results from the nature of the covenant; for each covenantor covenants with the covenantee and his assigns; and as the lands are transferable, it was reasonable that covenants annexed to them should be transferred.

As every covenantor in the various conveyances becomes liable for a breach of covenant to his covenantee and his assignees, it follows of course, that notwithstanding his conveyance of the land, he must, when subjected to pay damages for a breach of the covenant to his covenantee or his assignees, have a right of action for indemnity against his covenantor. This demonstrates that the rights and liabilities of the various parties to a covenant real, continue notwithstanding a conveyance of the land to which it is attached; and that any of them can sustain a proper action when injured by a breach of it.

It has been contended, that a covenant real, like the land, passes by the assignment of the land from the grantor to the grantee, and is thereby extinguished, and the grantor divested of it, so that he can maintain no action for a breach subsequent to the assignment; though it is conceded, that the covenant is revived in favor of the assignor by satisfying the damages for a breach of it. But the grantor does not become totally divested of the covenant by a grant of the land. By the conveyance of the estate, the grantee becomes entitled as assignee to the benefit of the covenants annexed to the land against his grantor, and all prior grantors; but this does not take away the right which his immediate grantor had to look to his grantor, and all prior grantors for indemnity, in case of a breach of the covenant subse-

¹ See *Hebert v. Handy*, 29 R. I. 543.

quent to the assignment, for which he is liable to pay damages. It cannot be said, that the covenant is extinguished by the assignment of the land, and then revived by being subjected to pay damages for a breach of it. If the covenant be once extinguished, it cannot be revived without the consent of both parties; and the circumstance that the assignor, on being compelled to pay damages for a breach of it to a subsequent assignee may maintain an action against his assignor, proves that the contract continued in force, and did not become extinguished by operation of the assignment.

To prove that the assignor cannot sue for a subsequent breach, 1 Chitty on Pleadings, 10, has been relied on; where it is said, an assignor cannot sue for a subsequent breach of a covenant running with an estate in lands, but the assignee must sue. This doctrine cannot be true to the extent contended for; as it would prove, that the assignor, after having paid the damages to his assignee, could not call on his assignor; though it is conceded in such case he could maintain an action. But to understand the meaning of Chitty, we must examine the authority to which he refers, 1 Saund. 241 c (Wms. edit.). It is there stated, "That the lessor cannot maintain an action of covenant after he has parted with the reversion for any breach of covenant accruing subsequent to the grant of the reversion; for the Statute of Hen. 8 has transferred the privity of contract, together with the estate in the land, to the assignee of the reversion." Thus, if one should lease land, and the lessee covenant to pay rent, or do particular acts on the land, and the lessor assign his interest in the reversion, then the Statute of 32 Hen. 8 transfers the privity of contract, and the assignee of the reversion only can maintain an action against the lessee for a breach of his covenant subsequent to the assignment; for he has the privity of contract and estate, and he can only be damnified by the breach of covenant on the part of the lessee. But suppose a lessor makes a lease with covenant of warranty; and the lessee assigns his interest in the estate; after which his assignee is evicted and recovers damages against him for the breach of the covenant of warranty; it will not be pretended that in this case, the lessee, who has now assumed the character of assignor, cannot maintain an action against his lessor on the covenant of warranty, though the breach happened subsequent to the assignment. The case there stated in 1 Saund. 241 c, must have related to covenants to be performed by the lessee, and must be understood to mean, that the lessor cannot bring an action of covenant *against the lessee* after he has parted with the reversion for any breach of covenant accruing subsequent to the assignment; which is a correct principle. It cannot mean that an assignor cannot sue for a subsequent breach; for this in many instances cannot be correct. The authority then relied on has no application to the point in dispute; and I apprehend the position is undeniable, that in all cases where there have been sundry conveyances of land, with covenants

real annexed to them, all the covenants between each party continue operative notwithstanding such conveyance, and every one when damnified can maintain an action.

In the present case, the grantee or covenantee of the plaintiff has been evicted; but the plaintiff has never been sued, nor has he paid the damages. The question is, whether under these circumstances, he can maintain this action against the defendant, who is his immediate covenantor.

The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective; though he may be constantly liable to be evicted; though his warrantor may be in doubtful circumstances,—yet he can bring no action on the covenant till he is actually evicted; for till then, there has been no breach of the covenant, no damage sustained. By a parity of reason, the intermediate covenantees can have no right of action against their covenantors, till something has been done equivalent to an eviction; for till then they have sustained no damage. As the last assignee has his election to sue all or any of the covenantors, as a recovery and satisfaction by an intermediate covenantee against a prior covenantor would not bar a suit by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action till he has satisfied the subsequent assignee; for otherwise every intermediate covenantee might sue the first covenantor; one suit would be no bar to another; they might all recover judgment, and obtain satisfaction; so that a man might be liable to sundry suits for the same thing, and be compelled to pay damages to sundry different covenantees for the same breach of covenant. In the present case, the plaintiff cannot know that his covenantee who has been evicted will ever sue him; he may bring his action directly against the defendant; a recovery in this suit, and payment of the damages, would be no bar; the defendant could then have no remedy but by petition for new trial; and if the plaintiff in the mean time should become unable to refund the money, the defendant would, by operation of law, be compelled to pay the same demand twice, without redress. But if the principle is adopted that the intermediate covenantee can never sue till he has satisfied the damages, no such injustice can ensue.

The subject may be considered in another view. In all these cases it is the duty of the first covenantor to make good the damages for a breach of the covenant, and to indemnify all the subsequent covenantees. Each subsequent covenantor is liable to all the subsequent covenantees, and on paying the damages will have a claim for indemnity against a prior covenantor. The nature then of the engagement of the first covenantor is, to indemnify all the subsequent covenantees from all damages arising from his breach of the covenant.

It may be proper, then, to examine what is necessary to give the surety a right of action against the principal. It would seem to be

a clear dictate of reason, that the mere liability to pay money for another, he continuing liable to pay the money himself, can never be a cause of action on the contract of indemnity; for it is uncertain whether the surety will ever be compelled to pay, and the principal may pay himself. Such uncertainty can be no ground of action. It is not necessary that actual payment should be made. If a suit should be brought, judgment rendered, or the person imprisoned, it will be sufficient; but mere liability, without any damage, is not. On this point no doubt could be entertained were it not for the decision in the case of *Filly v. Brace*, 1 Root, 507, where it is distinctly laid down, that mere liability, without any damage, is sufficient cause of action.

In examining this question it may be premised, that there is a difference between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damages by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid. But if it be to discharge or acquit the plaintiff from any damage by reason of such land or particular thing, then it is a condition to indemnify and save harmless. 1 Saund. 117, n. (1), (Wms. edit.). In the case of *Filly v. Brace*, much reliance is placed on cases of actions sustained by sheriffs for escapes when they had not paid the debt to the creditor. The ground is assumed, that the liability of the sheriff to pay the debt gives the right of action; but this is an erroneous assumption. The wrong done by the escape itself furnishes a cause of action. The sheriff would be entitled to recover, admitting he was not liable to the creditor. Suppose an escape, and before suit brought the debtor escaping pays the debt to the creditor, this would be no bar to an action; for by the wrongful act of the escape, a right of action accrued to the sheriff, which cannot be discharged without his concurrence; and the payment of the debt to the creditor could only go in mitigation of damages.

The case of *Griffith v. Harrison*, 1 Salk. 197, is also cited. That was a covenant to be discharged and indemnified from all arrears of rent; and the breach alleged was, that rent was in arrear. The court determined the declaration to be bad, because rent remaining in arrear and not paid, is not a damage, unless the plaintiff be sued or charged; and if paid at any time before such damage incurred by the plaintiff, it is sufficient. This is an unanswerable and conclusive authority to disprove the doctrine it is adduced to maintain. Here the liability to pay the rent is acknowledged; and the court say, it is not a damage, unless the plaintiff be sued or charged; and if paid at any time before, it is sufficient. So it may be said in the case of *Filly v. Brace*, the debt remaining unpaid is not a damage, unless the plaintiff be sued or charged; if the defendant pays it any time before the plaintiff is sued, he is not liable.

But the court do not seem to rely upon the principal point decided

in that case, but on a *dictum* contained in the report. It is there said, that where the counter bond or covenant is given to save harmless from a penal bond before the condition is broken, then if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter bond forfeited. This is the precise principle decided in the case of *Abbots v. Johnson*, 3 Bulstr, 233, cited in the case of *Filly v. Brace*, as proving the doctrine that mere liability is a ground of action. As these two cases contain but one decision which is reported at large in Bulstrode, I will examine that authority, and see whether it supports the doctrine for which it was cited. That was an action of debt on an obligation, and the case was, the plaintiff was bound in a bond with the defendant for payment of money on a day to come, and had a counter bond from the defendant for saving him harmless. The defendant paid not the money at the day. Upon this his default, the plaintiff brought his action on the counter bond. To this the defendant pleaded *non damnificatus*. The plaintiff replied, showing all this matter, and that he requested the defendant to pay this money, which he did not do; on which there was a demurrer. And the question was, whether this non-payment of the money at the day by the defendant be a present forfeiture of the counter bond, without other damage. The court decided, that the failure of payment at the day by the defendant, by which he put the plaintiff in danger of being arrested, was a damnification to him, and a present breach of the condition, and a forfeiture of the counter bond. Here it must be noted, that there was a bond conditioned to pay money at a future day; and the ground of the decision is, not the liability, but the failure of paying the money. When the plaintiff gave the penal bond with the defendant payable at a future time, no liability to be sued, or to pay the penalty, existed. When the counter bond was taken to save him harmless, it was in effect an engagement that he should never be liable to pay the money, or be subjected to the penalty. The failure to pay the money on the bond by the day rendered the plaintiff liable to pay the penalty; and this was a present breach of the condition of the counter bond; for by the non-payment of the money, a liability accrued which did not before exist, and this very liability arising from the failure of paying the money at the day, was the ground of sustaining the action. This is very far from proving, that where there is a contract to save harmless from an existing liability, such liability is a ground of action. Indeed, the fair inference is, that such liability is not to be deemed a ground of action from the circumstance that the court considers the failure of paying the money at the day as the forfeiture of the counter bond. I apprehend no authority can be found, that will support the doctrine laid down in *Filly v. Brace*; and the cases cited in favor of it, directly disprove it.

But let us examine this question on principle. What is the nature

of the contract to indemnify and save harmless? It is not that the plaintiff shall never be liable. The existence of the liability is the ground of the contract; and the object of it is to make good to the plaintiff any damage he may suffer by reason of it. This liability against the consequences of which the contract is to indemnify, cannot be a breach of the contract itself. There must be an actual damage arising from it to constitute a breach according to the terms of it. If liability without damage be a cause of action, then the contract is broken the moment it is made; and the defendant may be sued. He may be subjected to pay it to his surety; and as this will be no bar to a suit by the creditor, he may be compelled to pay it again, and then seek his remedy against the surety. The law will not countenance such absurdity and injustice. Nor is there any danger from delay to the surety; for if he suspects that the principal is in doubtful circumstances, he may at any time satisfy the demand; and then he has a clear right of action on the contract of indemnity.

This point is equally clear on authority. In all cases where the condition of the bond or contract is to indemnify and save harmless, the proper plea is *non damnificatus*. The defendant may say, that the plaintiff has not been damnified; and then it is necessary for the plaintiff to reply and show the damage to entitle him to recover. This incontestably proves that liability is not a ground of action; for the plea admits the existence of the liability, and denies the damage; and the reply setting forth the damage shows it to be necessary to constitute a ground of action. Suppose to the plea of *non damnificatus*, the plaintiff should reply the liability only? Will any lawyer say, that such reply is good? If not, the consequence is, that something more than liability must be shown; and this must always be actual damage.

In this opinion the other judges severally concurred.

*New trial to be granted.*¹

WITHY v. MUMFORD

5 Cow. (N. Y.) 137. 1825.

ON demurrer to the declaration. This was of a plea of breach of covenant, and stated that on the 21st of February, 1814, the defendant, by indenture between him and one Harnden, did grant, &c., to Harnden in fee, certain lands (describing them); and that he did covenant, &c., with Harnden, his heirs and assigns, &c., to warrant and defend the premises, &c., against all persons claiming, &c.; that on the day of the execution of this indenture, Harnden entered into possession of the premises, &c.; and afterwards, March 12th, 1817,

¹ Compare *Thompson v. Richmond*, 102 Me. 335.

by indenture between him and the plaintiff, conveyed the same premises to the plaintiff, in fee, who entered, &c.; but was afterwards evicted by certain persons having lawful title, before the defendant conveyed to Harnden. And so, &c.

The defendant cravedoyer of the indenture between Harnden and the plaintiff, which was granted; and the indenture set forth, contained a covenant of warranty from Harnden to the plaintiff, his heirs and assigns. For this cause,

Demurrer and joinder.

Curia, per SAVAGE, C. J. The point on which the defendant relies, is, that the deed from Harnden to the plaintiff containing a covenant of warranty, he cannot sue as assignee.

In the days of Lord Coke, the law was understood differently. He says, "If a man enfeoffeth A. to have and to hold to him, his heirs and assigns; A. enfeoffeth B. and his heirs; B. dieth, the heir of B. shall vouch as assignee to A.: so as heirs of assignees, and assignees of assigns, and assignees of heirs, are within this word (assigns); which seemed to be a question in Bracton's time. And the assignee shall not only vouch, but also have a *warrantia cartæ*." Co. Lit. 384 b, and the authorities there cited.

The same doctrine is found in *Spencer's Case*, 5 Rep. 17, and in all the books. That the covenant to warrant and defend, is a covenant which runs with the land, and that the assignee is entitled to the benefit of all such covenants, is a proposition which needs not the citation of an authority for its support. The doctrine will be found, however, in 4 Cruise's Dig. 452, 3 to 7.

The case of *Middlemore v. Goodale*, Cro. Car. 503, was an action by the assignee on the covenant for further assurance. The defendant pleaded a release from J. S. with whom he made the covenant, which release was executed after the commencement of the suit. All the court agreed, that the covenant ran with the land, and that the assignee should have the benefit of it.

From these authorities it is clear that the covenant of warranty runs with the land, and is intended for the benefit of the grantee, his heirs or his assigns, according to the language of the covenant itself.

But it is contended by the defendant, that though the assignee of the grantee may generally resort to the original grantor, for a breach of the covenant happening after the assignment; yet he has not such remedy, when he has a warranty from his immediate grantor. There is surely nothing in the covenant of warranty itself, to justify such a doctrine; nor is there any reason growing out of the acts of the parties, why the assignee, by taking a warranty from his immediate grantor, should lose his claim upon the first grantor. It cannot operate by way of release. If this were the consequence, a quitclaim deed would often be a better conveyance than one with full covenants.

It is contended, however, that this doctrine is supported by author-

ity, and the cases of *Greenby v. Wilcocks*, 2 John. 1, and *Kane v. Sanger*, 14 John. 89, are cited.

The case of *Greenby v. Wilcocks* decides, that an action upon the covenant of seisin, cannot be brought by the assignee, because the grantor, having no title when the covenant is made, it is broken immediately, before the assignment, and when broken, becomes a mere *chose in action*, and, as such, is incapable of assignment. This being the only reason given, it would seem to follow, that whoever was owner of the land, which was the *substratum* of the covenant, would be entitled to prosecute for the breach of a covenant running with that land, if broken while the land was in his hands. This case, therefore, proves nothing against the plaintiff's right of recovery in the principal case, but rather supports it. The plaintiff, an assignee, has been evicted. The covenant remained unbroken, till after the assignment to him. He has been damnified, not the original grantee, Harnden; and if the defendant's doctrine be correct, Harnden may recover damages which he never sustained, and may pocket the money; while the plaintiff, upon whom the whole loss has fallen, can recover nothing, if Harnden be unable to respond. Such a doctrine I should hold utterly untenable, were it not for what was said by the late Chief Justice Spencer, in the case of *Kane v. Sanger*.

That was an action of covenant, brought to recover damages for an eviction of the plaintiff's grantees. The counsel for the plaintiff seems not to have argued the main point; but placed his right to recover upon a variance between the defendant's notice and proof. Spencer, J., in delivering the opinion of the court, says, "It is a general rule, that where covenants run with the land, if the land is assigned or conveyed, before the covenants are broken, and afterwards they are broken, the assignee or grantee can alone bring the action of covenant to recover damages; but if the grantor or assignor is bound to indemnify the assignee or grantee, against such breach of covenant, then the assignor or grantor must bring the action." And he cites 2 Mass. Rep. 460.

In a subsequent part of the opinion, he admits, that to avoid circuitry of action, a release from the plaintiff's grantees to the defendant, would have been a bar to the suit, but for the circumstance, that they had given the plaintiff mortgages; and the mortgages reinvested the title in the plaintiff; so that, in effect, there were no assignees. The plaintiff having conveyed away the property, and received it back, stood as if no conveyance had ever been executed by him. These mortgages had been assigned to Morris; and it was a fact in the case, that the suit was brought by the direction, and for the benefit of Morris; so that the recovery, after all, was virtually in favor of the assignee.

The remark, therefore, that the assignee, with warranty, could not maintain an action, as assignee, for a breach after the assignment, was not called for. It professes to be supported by no authority, but

the case of *Bickford v. Paige*, 2 Mass. Rep. 460, *per* Parsons, C. J. With the greatest deference, I do not understand such doctrine to be there asserted. The case itself was an action by the covenantee, against the covenantor; and breaches were assigned upon the covenants of warranty, of seisin, and against encumbrances. The defendant pleaded, that the plaintiff, before suit brought, had conveyed to one Roberts, without any covenants making him liable for any defect of title. The plaintiff, in his replication, set out his deed to Roberts, being a release with warranty against himself, his heirs and assigns. To this replication the defendant demurred. No encumbrances were shown, nor any eviction. The court, therefore, decided, that the plaintiff ought to recover on the covenant of seisin, on the ground that this covenant having been broken before the plaintiff's release to Roberts, it was a *chose in action*, unassignable in its nature; and, therefore, did not pass to Roberts by the release. Parsons, C. J., in the course of delivering the opinion of the court, advances the doctrine relied on by the late Chief Justice of this court, in these words: "It is a general rule, that when a feoffment or demise is made of land with covenants that run with the land, if the feoffee or lessee assign the land, before the covenants are broken, and afterwards they are broken, the assignee, only, can bring an action of covenant, to recover damages, *unless the nature of the assignment be such, that the assignor is holden to indemnify the assignee against a breach of the covenants by the feoffor or lessor*. This rule is founded on the principle, that no man can maintain an action to recover damages, who can have suffered no damages."

Here, it is distinctly asserted, that the grantee, who is also the assignor, can maintain no action for damages, if he is himself not liable to his assignee. Why? because he can have suffered no damages. The assignee, who has suffered damages, and he only, can bring the action in such a case. But, if the assignor has covenanted to warrant the assignee, and has actually sustained damage, in consequence of his covenant, by a recovery against him, then he has his remedy over against his grantor. Having been damnified, he is thereby reinvested with his original rights. Then he will have suffered the damages, which he seeks to recover on the covenant to himself; and, in such a case, the assignee is not the only person, who, under any circumstances, may prosecute the original grantor. That this is what Chief Justice Parsons meant, is evident from what he lays down as the foundation of the rule. The reason he gives is, *that no man can recover damages, who has sustained none*. Mere liability is not enough. Actual damage must have been suffered by the assignor, to authorize the action by him. To place any other construction upon the language of Chief Justice Parsons, is to render him inconsistent with himself; besides making him stem the whole current of authority.

This subject has been very fully discussed in *Booth v. Starr*, 1

Conn. Rep. N. S. 244. The facts were, that J. Booth conveyed with warranty, to S. Booth, a lot of land in Hudson. Booth conveyed to a third person, he to a fourth, and he to the fifth grantee; all with covenants of warranty and seisin. The last grantee was evicted; but the plaintiff, S. Booth, was not damnified. Swift, J., states the question to be, whether, in the case of a covenant of warranty, annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor, without having been sued by, or satisfied the damages to the last covenantee, who has been evicted.

The question was discussed with great learning and ability, and at considerable length; and the court expressly decided, that the last covenantee, who has been evicted, may prosecute any, or all of the preceding covenantors, till he obtain satisfaction; but that no intermediate covenantee can sue his covenantor, till he himself has been compelled to pay damages upon his own covenant.

In this case, the plaintiff might have sued Harnden, his own immediate grantor. He did not choose to do so. Harnden may have been dead, or insolvent, or the plaintiff may have had other reasons for preferring a direct resort to the defendant. It is sufficient for his purpose, that he had a legal right to do this.

In the case of *Garlock v. Closs*, decided by this court, in May Term, 1824, a similar action was sustained by an intermediate covenantee, who had been damnified, though the property had passed through four different grantors, with warranty, down to himself. The plaintiff is entitled to judgment.

*Judgment for the plaintiff.*¹

B. Broken Covenants.

LEWES v. RIDGE

Cro. El. 863. 1601.

COVENANT. The defendant, being seised, of land in fee, let it for life, remainder for life, rendering rent. He afterwards acknowledged a Statute; and after that by indenture bargained and sold the reversion; and covenanted with the bargainee, his heirs, and assigns, that it should be discharged within two years of all Statutes, charges, and encumbrances, excepting the estate for life. The Statute is extended, and thereupon this reversion and rent was extended. The bargainee grants this reversion to the plaintiff, who, for not discharging of this Statute, brings covenant. And all this matter being disclosed by the count, it was thereupon demurred. The question principally moved was, whether the plaintiff, as assignee, shall have benefit of this covenant made to the bargainee by the common law, or by the 32 Hen. 8,

¹ Compare *Snadon v. Salmon*, 135 Ky. 47.

c. 34. — But because the covenant was broken before the plaintiff's purchase, the land being then in extent, and so a thing in action, which could not be transferred over, it was adjudged for the defendant that the action was not maintainable against him.

And here the court held clearly, that the 32 Hen. 8, c. 34, doth not extend to covenants upon estates in fee or in tail, but only upon leases made for life or for years, and therefore this assignee was out of the Statute. But for the other matter principally it was adjudged *ut supra*.

LUCY v. LEVINGTON

2 Lev. 26. 1671.

COVENANT, and declares, that Levington sold to Luke Lucy, the plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy the same against him and Sir Peter Vanlore, their heirs and assigns, and all claiming under them; and assigns for breach, that Croke, claiming under Vanlore, ejected him. The defendant pleaded, that at the time of the covenant he was seised of an indefeasible title, and that by a subsequent Act of Parliament, reciting, that Sir Peter Vanlore had settled this estate upon the Lady Mary Powell, and that certain persons had unduly procured her to levy a fine, 't was enacted, that this fine should be void, and that all persons might enter as if no fine had been levied; and that by force of this fine *et non aliter*, the defendant was seised, and sold and made this covenant; and that after the Act, Croke, claiming by title derived from the Lady Mary Powell, by the settlement of Vanlore, by virtue of the said Act of Parliament, entered and ousted him, upon which the plaintiff demurred. And for the defendant 't was argued, First, that the covenant was with Lucy, his heirs and assigns, touching an estate of inheritance; therefore the action ought to be brought by the heir or assignee, whose loss it is, and not by the executor. To which 't was answered and resolved by the court, *That the eviction being to the testator*, he cannot have an heir or assignee of this land; and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator. 2. 'T was argued, that the title on the covenant being good at the time of the making, and the title upon which the evidence depends, created by subsequent Act of Parliament; here is no breach, 9 Co. Rep. 106, 107, *Dame Gresham's Case*. To which 't was answered and resolved by HALE and RAINSFORD, that the Act does not make a new title, but removes the obstruction that kept off the old title; and they said, that doubtless Sir Peter Vanlore was named in the covenant, for the purpose that they might be secured in case this fine thus unduly obtained should be avoided. But TWYSDEN being of a contrary opinion, a writ of error was brought immediately. *Sed quid inde venit nescio*.

KINGDON, EXECUTRIX v. NOTTLE

1 M. & S. 355. 1813.

THIS action was brought by the plaintiff, as executrix of Richard Kingdon; and the declaration stated, that by indentures of lease and release of the 11th and 12th of May, 1780, the defendant conveyed to R. Kingdon in fee a 4th part of certain lands therein particularly described, with a proviso for redemption upon payment of £450; and that the defendant covenanted for himself, his heirs, executors, and administrators, with R. Kingdon, that he the defendant was at the time of the execution of the indenture seised of and in the premises of a good and indefeasible estate of inheritance in fee simple: and that he had good right to convey the same to R. Kingdon and his heirs: and further, that the defendant would from time to time, upon every reasonable request of R. Kingdon, his heirs or assigns, but at the defendant's costs, execute any further conveyance for the purpose of assuring and confirming the premises to R. Kingdon, *his heirs and assigns*; and then the following breaches were assigned: first, that the defendant was not seised in fee at the time of the execution of the indenture: secondly, that the defendant had not at that time good right to convey: lastly, that the plaintiff, as executrix after the death of R. Kingdon, made a reasonable request to the defendant to execute an indenture between the defendant of the first part, the plaintiff of the second part, and Samuel Anstice of the third part, intended to be a release of the premises for suffering a common recovery for the better assuring and confirming the premises to the uses mentioned in the deed; and tendered the same to the defendant for execution, but the defendant refused to execute. The defendant demurred to the first and second breaches, assigning for causes that they are assigned too generally, and are not sufficiently precise and certain, and that it does not appear that R. Kingdon sustained or could have sustained any damage by the said breaches of covenant, or either of them, nor that he was at any time interrupted or disturbed in his enjoyment of the premises conveyed to him by the defendant; nor that the said Elizabeth has or claims any interest in the premises, or that she is heir at law, or assignee of the same, or any part thereof. He demurred also to the last breach, assigning for causes, that it does not appear that the said Elizabeth hath or claims to have any interest in the premises, as assignee or otherwise, of R. Kingdon, nor to what person, or for whose use the deed of release was intended to inure, or why or for what reason Samuel Anstice was made a party thereto, nor that the said deed of release was a reasonable conveyance or assurance in that behalf: and also for that the said last-mentioned breach of covenant cannot by law be joined in the same declaration with the other breaches of covenant in the said declaration assigned: and also for that the said declaration as to the

said breach of covenant lastly assigned is in various other respects insufficient, informal, and defective. Joinder.

LORD ELLENBOROUGH, C. J. This is a case in which a person may have formed his opinion from what is to be found in a book of very excellent authority, I allude to Comyns's Digest (Com. Dig. tit. Covenant, B. 1), in which it is laid down generally that if a man covenant with B. upon a grant or conveyance of the inheritance, his executor may have covenant for damages upon a breach committed in the lifetime of his testator. But when that position comes to be compared with *Lucy v. Levington*, which is the authority there cited in support of it, it will be found not to be borne out by that case in its generality; for in that case there was an eviction in the lifetime of the testator, and therefore the damages in respect of that eviction, for which the action was then brought, were properly the subject of suit and recovery by the executor; and nothing descended to the heir. But in this case there is no other damage than such as arises from a breach of the defendant's covenant that he had a good title, and there is a difficulty in admitting that the executrix can recover at all, without also allowing her to recover to the full amount of the damages for such defect of title; and in that case a recovery by her would bar the heir; for I apprehend the heir could not afterwards maintain another action upon the same breach. Had the breach here been assigned specially with a view to compensation for a damage sustained in the lifetime of the testator, and so as to have left a subject of suit entire to the heir, this action might have gone clear of the difficulty, because then it would not operate as a bar to the heir; but framed as it now is, it seems to me that it would operate as a bar to his action. It is certainly a new point; and if I thought that more authorities could be found than what have been cited, which, however, from the industry of the gentlemen who have argued the case, is not very probable, I should have paused. But what has been cited from Co. Lit., and the other authorities, that the executor of a person who died seised of a rent could not maintain an action to recover the arrears incurred in the lifetime of his testator, inasmuch as he could not represent his testator as to any contracts relating to the freehold and inheritance, is in a great degree an authority to show that in the present case the executrix does not stand in a situation to take advantage of this breach of covenant. Therefore on the principle of what is there laid down, and in the absence of any damage to the testator, which, if recovered, would properly form a part of his personal assets, I do not know how to say that this action is maintainable.

LE BLANC, J. This action is brought by the executrix to increase the personal estate of the testator. The difficulty arises from its being assigned as a breach of covenant in the lifetime of the testator. The breach assigned is in not having a good title. But how is that breach shown to have been a damage to the testator? It is not alleged that

the estate was thereby prejudiced, during the lifetime of the testator; and if after his decease any damage accrued, that would be a matter which concerns the heir. The distinction which attends real and personal covenants with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor. Now this is a covenant on which after one breach has been assigned and a recovery had thereon, the party cannot again recover. It is not like a covenant for not repairing, for a breach of which damages may be recovered now, and again hereafter, and so *toties quoties*; although even in that case there is always a difficulty in apportioning the damages. But here no breach from which a damage accrued to the testator is stated at all. Yet the action is brought to increase the personal estate, which belongs to the executor; when the estate itself, such as it is, has come to the heir.

BAYLEY, J. The testator might have sued in his lifetime; but having forborne to sue, the covenant real and the right of suit thereon, devolved with the estate upon the heir. If this were not so, and the executrix was permitted to take advantage of this breach of covenant, she would be recovering damages to be afterwards distributed as personal assets, for that which is really a damage to the heir alone; and yet such recovery would be a complete bar to any action which the heir might bring. The case of *Lucy v. Levington* struck me as a strong authority for the defendant: because in that case it appears there was an actual damage accruing to the testator by the eviction, whereby he was deprived of the rents and profits during his life, and of course the personal estate was so far damnified. There, as I have before observed, if the executor could not have sued, no other person could, because the testator having been evicted, there could be no heir of the land, and that was given as a reason why the action was holden to be maintainable. *Judgment for the defendant.*

KING v. JONES AND ROWLAND, EXECUTORS

5 Taunt. 418. 1814.

HEATH, J.¹ This is a motion in arrest of judgment. This action appears to have been brought by the plaintiff as heir of his father, against the defendant as executor of Richard Griffin, upon the covenant of the testator; and the pleadings disclose these facts: by lease and release of the 6th and 7th of October, 1794, T. Worge, and Griffith and his wife, conveyed certain premises to J. King; and Griffith covenanted with J. King that he and Mary his wife would do

¹ Only the opinion is given.

all reasonable acts for the further conveyance of the premises. The pleadings further disclose, that there was a request made by John King the ancestor, to Griffith, to levy a fine: that no fine was levied: that J. King the ancestor died; and the premises descended to the plaintiff as the heir of John King, and the plaintiff has since been evicted: and the question is, whether the plaintiff can sustain this action. It was admitted that this is a covenant which runs with the land. Under this covenant the heir might call for further assurances, even to levy a fine: he certainly might have called for the removal of a judgment, or other encumbrances. It appears that John King the ancestor was a willing purchaser: he paid his purchase-money, relying on the vendor's covenant: he required him to perform it, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do, until the ultimate damage was sustained; for otherwise he could not have recovered the whole value: the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty), in preference to the executor. These are the principles of the case; how are the authorities? There are few old authorities directly in point, but there is one recent case that is directly applicable. The old authorities are, Fitzherbert, N. B. Writ of Covenant, p. 341 C. "If a man make a covenant by deed to another, and his heirs, to enfeof him and his heirs of the manor of D. &c., now, if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of covenant upon that deed:" he cites the *Case of Sir Anthony Cook*, Dy. 337; also reported in Anders. 53. [Here his Lordship read the case.] The recent decision is that of *Kingdon v. Nottle*, last Easter Term, 1 Maule & Selwyn, 355, wherein the Court of King's Bench held that the executor could not recover upon a breach of the defendant's covenant with the testator, that he, the defendant, had a good title to convey, the testator having sustained no damage in his lifetime; therefore it follows that the heir might so recover. The court there follow the doctrine of *Lucy v. Levington*, and they advert to the circumstance which differs that case from this, that there the ultimate damage was sustained in the time of the ancestor, and therefore the land did not descend to the heir; consequently the covenant, which runs with the land, did not descend to the heir. The consequence is, that this judgment ought not to be arrested, and that the rule must be discharged.

Rule discharged.

KINGDON v. NOTTLE

4 M. & S. 53. 1815.

COVENANT by the plaintiff as devisee of Richard Kingdon; and the plaintiff declares that by indentures of lease and release of the 11th and 12th of May, 1780, the defendant conveyed to R. Kingdon in fee a fourth part of certain lands therein particularly described, with a proviso for redemption upon payment of £450; and that the defendant covenanted for himself, his heirs, executors, and administrators, with R. Kingdon, that he the defendant was at the time of the execution of the indenture seised of and in the premises of a good and indefeasible estate of inheritance in fee simple; and that he had good right to convey the same to R. Kingdon and his heirs; and then the plaintiff avers that R. Kingdon, on the 3d of May, 1791, duly made his will, &c., and thereby devised the same premises to her in fee, and died seised, and that she (the plaintiff) entered into the premises, and became and was and continually hath been possessed thereof, and seised of and entitled to all such estate and interest of and in the same as R. Kingdon had in his lifetime, and at the time of his death, and assigns for breach, 1st, that the defendant, at the time of the execution of the indenture, was not seised, &c., 2dly, that he had not good right to convey to R. Kingdon and his heirs, &c. And so the plaintiff says, that by reason thereof the premises are of much less value, to wit, less by £2,000 to the plaintiff than they otherwise would be, and that she hath not been able to sell, and hath been prevented and hindered from selling the same, for so large a price or so beneficially and advantageously as she otherwise might have done. And so she saith that the defendant hath not kept his covenant so made with R. Kingdon, but to keep the same with R. Kingdon in his lifetime, and the plaintiff, since his death, hath wholly refused.

Demurrer assigning for cause, 1st, that it appears by the declaration that the supposed breaches of covenant therein assigned were committed in the lifetime of R. K., before the plaintiff had any estate or interest in the premises; and also, that it does not appear by the declaration that R. K. was at any time disturbed or interrupted in the enjoyment of the premises by the defendant or any other person, or sustained or could have sustained any damage by the same supposed breaches of covenant or either of them, and also for that it is not alleged that the plaintiff hath at any time since the death of R. K. been interrupted or disturbed in the enjoyment of the premises, or any part thereof, or hath sustained any damages from the supposed breaches of covenant or either of them; and also that it does not appear that any person hath refused to purchase the premises on account of the supposed breaches of covenant, and also that the allegations that the premises are of much less value than they

otherwise would be, and that the plaintiff hath not been able to sell, and hath been prevented and hindered from selling the same for so large a price or so beneficially and advantageously as she otherwise might have done, are too general, and do not give the defendant sufficient notice of the supposed damage.

Joinder.

LORD ELLENBOROUGH, C. J. The rule with respect to the executor's right to sue upon breaches of contract made with the testator was considered in the former case of *Kingdon v. Nottle* as subject to some qualification; and in a still more recent case, *Chamberlain v. Williamson*, 2 M. & S. 408, it was considered that he could only recover in respect of such breach as was a damage to the personal estate. But here the covenant passes with the land to the devisee, and has been broken in the time of the devisee; for so long as the defendant has not a good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's lifetime; but according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate.

LE BLANC, J. If the covenant is to cease with the breach of it, then if it be broken, and the covenantee die immediately after, the covenant will be gone; and yet the injury arising from the breach would accrue altogether to the devisee.

DAMPIER, J. This is a covenant which runs with the land; but if it may be broken but once, and ceases *eo instanti* that it is broken, how can it be a covenant which runs with the land?

*Judgment for the plaintiff.*¹

GREENBY AND KELLOGG, ADMINISTRATORS v. WILCOCKS

2 Johns. (N. Y.) 1. 1806.

THIS was an action of *covenant*. The declaration set forth a deed, made the 30th of August, 1792, between the defendant, of the one part, and Carlile Pollock, of the other part, by which the defendant conveyed to Pollock, certain lots of land, in the county of Cayuga. The deed contained the usual *covenants*, on the part of the grantor with the grantee, his *heirs* and *assigns*; namely, that the grantor was well seised in fee, &c., had power and right to grant and convey; that the grantee should quietly enjoy, free from encumbrances, &c.,

¹ But see *Spoor v. Green*, L. R. 9 Exch. 99; *Turner v. Moon*, [1901] 2 Ch. 825, 829. Compare St. 44 & 45 Vict., c. 41, § 7, Subd. 6.

and a *warranty* against the grantor and his heirs, and all persons whomsoever. The declaration further stated, that Pollock entered, and was possessed of the premises; and afterwards, on the 17th July, 1793, he and his wife granted and conveyed one of the lots of land, to Abraham Hardenbergh, who entered, and was possessed thereof; and being so seised and possessed thereof, afterwards, on the 5th July, 1794, granted and conveyed the same lot to Kellogg, the intestate. The plaintiff then averred, that at the time of executing the deed to Pollock, the defendant "was not seised and possessed of any right, title, or interest whatsoever, of, and in the said last described lot of land, but the title to the same lot of land, was vested in one John H. Holland; nor had the defendant any lawful power or authority, to sell and convey the same as aforesaid; nor hath the defendant secured and defended the said Pollock, Hardenbergh, or Kellogg, or either of them or their assigns, or the plaintiffs, in the quiet possession of the said lot of land; but, on the contrary, the said Kellogg, afterwards, in his lifetime, to wit, on the 5th July, 1794, was expelled from, and dispossessed of, the said lot of land; of all which, the said defendant had notice, &c., and so the plaintiffs say, that though often requested, &c., the defendant hath not kept his said covenant, so made and entered into, with the said Pollock," &c.

To this declaration, the defendant *demurred*, and the plaintiffs joined in demurrer.

SPENCER, J. The plaintiff's right to judgment, must rest on the covenants of seisin, and power to sell and convey in fee-simple. The eviction stated in the declaration, does not appear, nor is it averred, to have taken place by process of law; covenants for quiet enjoyment and a general warranty, extend only to lawful evictions. Some of the cases admit, that the action lies for breach of covenant for quiet enjoyment, if the person to whom the right belongs *oust* the possessor. In the present case, it is not alleged, that the *ouster* was committed by any person having right, or superior title.

It is objected, that the plaintiffs cannot recover on the covenants of *seisin*, and that the grantor had power to convey, because, it is alleged in the declaration, that there was a total defect of title in the defendant, at the time he executed the deed, and that the covenants then broken, could not be assigned over by the first grantee.

There is great force in this objection, and it appears to me conclusive. *Choses in action* are incapable of assignment, at the common law; and what can distinguish these covenants, broken the instant they were made, from an ordinary *chose in action*? The covenants, it is true, are such as run with the land, but here the substratum fails, for there was no land, whereof the defendant was seised, and of consequence, none that he could *aliene*; the covenants are, therefore, naked ones, uncoupled with a right to the soil. This point was determined in the case of *Lewis v. Ridge*, Cro. Eliz. 863. The court held, in that case, that the covenant being broken, before the plain-

tiff's purchase, and so, though the covenants were against the precise encumbrance, that it was a thing in action, which could not be transferred over, and judgment was given for the defendant on demurrer. I cannot find that this case has been overruled. *Spencer's Case*, 15 Co. 17, presents a very distinct question, from the one now under consideration; it involved only the case of an assignee of a *term*, sued by the lessor, with respect to the covenants, which running with the land, are imposed upon the assignee.

I am, therefore, of opinion, that the defendant must have judgment.

KENT, C. J., THOMPSON, J., and TOMPKINS, J., declared themselves to be of the same opinion.

LIVINGSTON, J. I cannot assent to this opinion. One of the covenants declared on, is that of a seisin in fee of the grantor. It since appearing, that he was not thus seised, and, of course, that this covenant was broken immediately on executing the conveyance, it is now said that it could not be transferred, so as to entitle the assignee to an action for the breach of it.

One would naturally suppose, that every covenant in a deed conveying an estate of inheritance, would pass with the land, and confer on the owner, however remote from a former grantor, a remedy for an unsatisfied violation of any of them, without inquiring when the right of action first accrued. They all extend, by express terms, as well to assigns *ad infinitum*, as to the first grantee. It comports, then, with the contract, and is in itself reasonable, that they should *all* form a part of every grantee's security; nor can it be right, that those who come in under this covenant, which may be the only one in a conveyance, shall not be able to recover any part of a large consideration, merely because an alienation intervened, prior to a discovery of any defect of title. By this means a most useful covenant, and in daily use, will become a dead letter, before it can be enforced, as, very often, repeated sales take place, before a title is discovered to be bad. We are, however, told, that such is the law, and are referred to some authorities. Between the case of *Lewis v. Ridge* and this one, there is a distinction which will be an excuse for not applying it in a way, that the court could not have intended, and which can answer no other purpose, but that of depriving an innocent purchaser of his remedy, and of annulling (which courts sometimes take the liberty of doing) a contract, to which the parties have solemnly bound themselves. The distinction is this. In the case from Croke, the covenant (which was to discharge all *Statutes, &c.*, in two years) was not only broken, but this was *known* to the purchaser; for a Statute, which was the encumbrance complained of, was matter of record, and the land, at the time of sale, was *actually* extended for its satisfaction. It was, *therefore*, thought, that the plaintiff had bought a *chose in action*, and the court (which was less indulgent formerly than at present, to these bargains) set

its face against him. But in cases of the kind before us, such knowledge can rarely exist, for as soon as a title is discovered to be questionable, there will generally be a stop to farther alienation. The reasoning, therefore, in this case, does not apply; for why punish a person for buying a *chose in action*, by a forfeiture of his remedy, when he neither knew, nor suspected, at the time, that such a right existed? It might be asked, What makes a covenant more a *chose in action* after, than before its breach? In all purchases in fee, has not the land always been considered, as it really is, the thing bargained for, and that the covenants without distinction, necessarily pass with it? Thus we shall get rid altogether of the idea of purchasing a thing in action, which can only be entertained by a fanciful distinction between covenants broken, and those which may be broken in future. Is there in reality, anything more obnoxious or criminal in assigning the one, than the other? If there be any turpitude in the thing, why do courts, nowadays, go so far in supporting transfers of *choses in action*, as to protect the rights of an assignee, though not a party to the record? Another case, more recent, that of *Andrew v. Pearce*, 1 Bos. and Pull. New Rep. 158, which was also relied on, proceeded on the ground of the lease being *absolutely void*, prior to its assignment, and that, therefore, *no interest in the land, could pass under it*; of course, there remained *only* a right of action to sell. Now, though the party in that case ought, perhaps, to have been *estopped*, from saying that *nothing* passed by his deed, yet taking this decision as we find it, and even receiving it, late as it is, as authority, it makes in favor of the plaintiff. From the judgment delivered by Sir James Mansfield, and the reasonings of all the counsel, it is evident, that if *any interest in the land* had passed with the assignment, the covenant whenever broken, would have passed with it, and the action been supported. If so, how does it appear, that nothing passed by the deed of Wilcocks, or by the one to the plaintiffs' intestate? Though it was not a fee simple (which must be the only meaning of the averment in the declaration), some smaller estate or interest may have passed, which would have carried the covenant of seisin along with it, and been sufficient to take this case out of the *principle* of *Andrew v. Pearce*.

But this is not the ground on which I rest; it is that of the *contract* itself, by the words of which all the covenants passed to every grantee *ad infinitum*, and gave him, of course, an action in his own name, against any preceding grantor, whether a breach happen before or after the assignment, provided no satisfaction has been obtained from it in another name. Nor is it without authority that this ground is taken, for in the *Case of Spencer*, in Sir Edward Coke's reports, it was resolved, "that if the assignee of a *lessee* be evicted, he shall have a writ of covenant, for it is reasonable if he be evicted, that he shall take such benefit of the

demise, as the first lessee might, and the lessor hath no other prejudice, than what his *especial contract* with the *first lessee*, hath bound him to." In this lease it is worthy of remark too, that there was no express covenant, but only words which implied one. It is not stated, it is true, when the breach took place, but the lessor without any such distinction, is placed, in relation to the sub-tenant, on precisely the same footing, as it respected a remedy on the lease, as he stood in with regard to his immediate lessee. The court must have considered the contract of assignment as entire, and that with it, not only the land, but all the agreements of the lessor, passed; for it is not easy to be understood, how the covenant of warranty should pass to the grantee, as it is admitted it did, so as to give him a right to sue in his own name, and yet that a different rule is to be applied as to the covenant of seisin.

I concur in the opinion delivered, as to the mode of stating an eviction, in which respect the declaration is imperfect; but the breach of the covenant of seisin being well assigned, the plaintiff, in my opinion, is entitled to judgment.

*Judgment for the defendant.*¹

CLARK AND ANOTHER v. SWIFT

3 Met. (Mass.) 390. 1841.

COVENANT broken. The declaration alleged that the defendant, on the 2d of June, 1815, by his deed conveyed certain land in Andover to Thomas Holt, and in said deed covenanted with Holt, his heirs and assigns, that the conveyed premises were free from all encumbrances: That the plaintiffs, by virtue of a conveyance of said land by Holt, and by sundry subsequent conveyances thereof, have acquired title thereto, and, on the 5th of November, 1830, became the assigns of the defendant, and ought to have and enjoy the land free of all encumbrances, according to the defendant's covenant aforesaid: That the land, when the defendant so conveyed it to Holt, was not free from all encumbrances, and never since has been; but that the defendant, on the 9th of April, 1814, conveyed to Ralph H. Chandler, his heirs and assigns, a right of way over said land, and "the privilege of going to and using the well and pump" upon said land; which rights "still exist, and did exist at the time of making said deed to said Holt, and have existed ever since," as an encumbrance on the land.

At the trial before *Putnam, J.*, the facts stated in the plaintiffs' declarations were proved or admitted, and a verdict was returned

¹ The principal case has had a large following in the United States. But see *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Allen v. Kennedy*, 91 Mo. 324; *Coleman v. Lucksinger*, 224 Mo. 1; *Backus v. McCoy*, 3 Ohio 211; *Mecklem v. Blake*, 22 Wis. 495. For statutory changes. see Rawle, *Covenants for Title*, 5th ed., § 211, and *Geiszler v. DeGraaf*, 166 N. Y. 339, *post* p. 582.

for the plaintiffs, subject to the opinion of the whole court, whether they could maintain the action.

Several points of defence, which were raised on the evidence, and ruled against the defendant at the trial, are here omitted, as it became unnecessary for the court to decide upon them.

This case was argued at Boston, January 21, 1841.

WILDE, J. At the trial of this cause several questions of law were raised and reserved for the consideration of the court, most of which, according to the view we have taken of the case, become immaterial, as we consider one objection to the form of the action conclusive in favor of the defendant.

The action is founded on the alleged breach of the defendant's covenant against encumbrances in his deed to Thomas Holt of the premises described in the writ, and from whom the plaintiffs derive their title. The breach alleged is, that at the time of executing said deed to the said Holt, the land conveyed to him was not free from all encumbrances, but that the defendant had before that time granted a passage and right of way, over and along said land conveyed, to one Ralph H. Chandler; which encumbrance, it is averred, still exists, and did exist at the time of making said deed to said Holt, and has existed ever since. Thus it appears, by the plaintiffs' own showing, that the covenant on which they rely was broken as soon as made; and that a covenant thus broken does not run with the land, is a well-established doctrine of the common law. A right of action for the breach of this covenant immediately accrued in favor of Holt, and this chose in action, like all other choses in action, is not assignable, so as to authorize the assignee to maintain an action in his own name. An assignee cannot sue upon a breach of covenant that happened before his time. Com. Dig. Covenant, B. 3. Bac. Ab. Covenant, E. 5. The case of *Lucy v. Levington*, 2 Lev. 26, is a leading authority on this point, in which it was decided that an action by the executor of the covenantee upon a covenant for quiet enjoyment of land conveyed was well brought; the breach assigned being that the plaintiff's testator was evicted in his lifetime, and so the covenant being broken, did not go with the land to the heir. So in *Lewes v. Ridge*, Cro. Eliz. 863, which was an action by an assignee, on a covenant which had been broken before the assignment, it was held that for such a breach, being a thing in action not transferable by law, an action was not maintainable in the name of the assignee.

A different doctrine, however, was laid down in the case of *Kingdon v. Nottle*, 4 M. & S. 53, in which it was held that an action might be maintained by a devisee of the grantee of land, on the covenant or seisin, although broken in the lifetime of the testator; the breach being considered as continuing in the time of the devisee. It was also decided in *Kingdon v. Nottle*, 1 M. & S. 355, that for such a breach of covenant no action could be maintained by the executor

of the grantee. But it seems difficult to reconcile these decisions with the former authorities, and with the well known rule of the common law, that choses in action are not assignable; and they are certainly against the current of subsequent authorities.

In the case of *Bickford v. Page*, 2 Mass. 455, it was decided that the covenant of seisin, having been broken immediately on the execution of the deed, was then a chose in action, and not assignable. So in *Prescott v. Trueman*, 4 Mass. 627, it was held that the covenant against encumbrances is broken immediately by any subsisting encumbrance. And recently, in *Thayer v. Clemence*, 22 Pick. 493, 494, the same doctrine is laid down by the Chief Justice, in delivering the opinion of the court: "the usual covenants in a deed of warranty, are, that I am seised, &c., that I have good right, &c., that the premises are free of all encumbrances. These," he says, "are all *in præsenti*, and if the facts covenanted to be true are not so, the covenants are broken when made, the right to enforce them is a chose in action, and cannot be assigned so as to enable an assignee to bring an action in his own name."

The same doctrine is held in New York: *Greenby v. Wilcocks*, 2 Johns. 1; *Hamilton v. Wilson*, 4 Johns. 72; *Kane v. Sanger*, 14 Johns. 89; and in New Jersey: *Chapman v. Holmes*, 5 Halst. 20; *Garrison v. Sandford*, 7 Halst. 261; and in Vermont: *Garfield v. Williams*, 2 Verm. 327; and in Connecticut: *Mitchell v. Warner*, 5 Conn. 497. In the latter case Chief-Justice Hosmer examined the doctrine and the authorities very fully, and with great ability; and particularly the case of *Kingdon v. Nottle*. "From the opinion in that case," he declares, "I am compelled to dissent *in omnibus*. First, I affirm that the novel idea attending the breach in the testator's lifetime, by calling it a continuing breach, and therefore a breach to the heir or devisee at a subsequent time, is an ingenious suggestion, but of no substantial import. Every breach of a contract is a continuing breach, until it is in some manner healed; but the great question is, *To whom* does it continue as a breach? The only answer is, To the person who had title to the contract, when it was broken. A second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces. It has no analogy to a covenant to do a future act at different times, which may undergo repeated breaches." He concludes, therefore, that the determination in the case of *Kingdon v. Nottle* "is against the ancient, uniform, and established law of Westminster Hall, and against well-settled principles and decided cases in the surrounding States."

These objections to the decision in the case reviewed are certainly very forcibly expressed. That decision, as Chancellor Kent remarks, was severely criticised. But we concur in the opinion that the decision cannot be reconciled with a well-established principle of the common law. The distinction on which the principle, that choses

in action are not assignable, is evaded, is not well founded. Chancellor Kent says, "The reason assigned for the decision is too refined to be sound." 4 Kent Com. (3d. ed.) 472. There was not in that case, and there could not have been, but one breach of the covenant of seisin. "It was single, entire, and perfect, in the first instance;" and thereupon a right of action vested in the testator; and, unless this right could by law be transferred to the devisee, no action in his name could be maintained in a court of law. This rule as to choses in action is a technical rule, it is true, and does not affect the merits of the case. But technical rules, and rules as to the forms of proceedings, must be observed, without regard to the consequences which may follow in particular cases; otherwise, the stability of judicial decisions, and the certainty of the law, cannot be preserved.

As to the rule in question, it interposes a formal difficulty only; and it is no actual obstruction to the due administration of justice. The assignment of a chose in action is valid in equity, and courts of law will take notice of equitable assignments, made *bona fide* and for a valuable consideration, and will allow the assignee to maintain an action in the name of the assignor.

In the present case, however, the action could not be maintained, although it had been brought in the name of Holt, the original grantee; because it is clear that the action accrued to him more than twenty years before the present action was brought, if in fact there was an existing encumbrance on the granted premises, at the time of the grant. The action, therefore, would be barred by the Statute of Limitations. It is true, that if such an action had been brought before any disturbance of the possession, and before the encumbrance had been removed, the plaintiffs would have been entitled to only nominal damages; but then twenty years are allowed, in such a case, after the breach of the covenant, for the party to clear away the encumbrance, and to entitle himself to a full indemnity. And if he lies by until the limited time expires, without removing the encumbrance and commencing his action, the Statute of Limitations will certainly be a good bar.

The plaintiffs' only remedy, if they have any, is on the covenant of warranty. That covenant runs with the land; and if the plaintiffs had been evicted by a paramount title, they could undoubtedly maintain an action for the breach of that covenant, in their own names. Whether the facts reported show such a disturbance of the possession as would be considered equivalent to an eviction by a title paramount, is a question upon which at present we give no opinion. The question cannot be raised in this case, unless the plaintiffs should move for leave to amend their declaration, which may be allowed on such terms as the court may hereafter direct.

(On motion the plaintiffs had leave to amend their declaration.)¹

¹ See, *accord*. *Mitchell v. Warner*, 5 Conn. 497 (1825). *Contra*, *M'Crady v. Brisbane*, 1 Nott & McC. (So. Car. 1818).

COLE AND WIFE v. KIMBALL

52 Vt. 639. 1880.

COVENANT. The declaration counted on a covenant against encumbrances in a deed from the defendant to the plaintiff Florette. The case was referred, and the referee reported in substance as follows:

On August 26, 1871, the defendant by warranty deed containing the usual covenants, including a covenant against encumbrances, conveyed to the plaintiff Florette certain premises in Braintree that had been conveyed to him by Mansel Heselton and wife; and said Florette, in payment therefor, conveyed to the defendant a farm which had before been conveyed to her by her father, Leonard Fish, and with her husband executed to him a promissory note for \$462, which said Leonard afterwards paid. On June 11, 1872, the plaintiffs by like deed conveyed the premises to Lucia M. Fish, the mother of said Florette, and wife of said Leonard. The premises when conveyed by the defendant as aforesaid, were subject to a mortgage executed by Heselton and wife to Elihu Hyde in 1869, conditioned for the payment of two promissory notes for \$250 each, payable in one and two years respectively, with interest, one of which only had been paid. In December, 1875, Hyde brought a petition for foreclosure against the Fish's and others, but not against the Heseltons nor the Coles, and in the following January obtained a decree for \$313.29, the sum due in equity, and \$28.55 costs, to be paid before January 1, 1877, with interest. On November 1, 1876, Hyde sold and assigned that decree to Ephraim Thayer for \$350, Thayer acting therein for said Leonard and at his request; and afterwards, and before this action was brought, said Leonard, acting therein for his wife, paid Thayer the amount of the decree in full, with interest. The conveyance from said Leonard to said Florette, and from her to said Lucia were without consideration, and they and the holding of title by said Florette were for the convenience, and at the request, of the Fish's, said Leonard doing all the business in connection therewith, and the plaintiffs having nothing to do with it, except to execute deeds, &c., as desired. This action was brought and prosecuted by said Lucia, in her own behalf and for her own benefit, and with the privity and consent of said Leonard. The referee found that if the plaintiffs were entitled to recover, they should recover \$341.84, with interest from January 1, 1876.

While the action was pending the Fish's, in consideration that final judgment should ultimately be rendered therein for the plaintiffs for the full amount of damages found by the referee, filed in court a release of the defendant from all causes of action that they or either of them had, or could have, in their own names to recover damages consequent on a breach of any of the covenants in his deed to said Florette.

The court at the December Term, 1879, *Powers, J.*, presiding, rendered judgment on the report for the plaintiffs for nominal damages and costs; to which the plaintiffs excepted.

The opinion of the court was delivered by

ROYCE, J. It is conceded that the plaintiffs are entitled to nominal damages; and the only question made is, whether upon the facts found by the referee they are limited to the recovery of such damages, or are entitled to recover the amount paid to redeem the premises from the Hyde decree. This suit was brought and prosecuted by Lucia M. Fish, for her benefit, with the privity and consent of her husband, Leonard Fish, who acted for her in paying the money to redeem the premises from the Hyde decree. Florette D. Cole held the title to the premises conveyed to her by the defendant as the trustee of Leonard and Lucia M. Fish, and the covenants contained in the deed from the defendant to Florette D. are in equity to be treated as covenants for the benefit of the *cestuis que trust*. All the interest that Florette D. had in said covenants passed to Lucia M. Fish by the deed from the plaintiffs to her. The defendant is liable on the covenants in his deed to protect the title against the encumbrances that were upon the premises described in the deed at the time of its execution. The covenant against encumbrances runs with the land, and can be enforced for the benefit of the party holding the legal title. The payment of the amount due on the Hyde decree was not a voluntary payment, but a compulsory one. Fish was obliged to make it to save his title to the premises. The claim to indemnity on account of the breach of the covenants of title and against encumbrances was a chose in action, and was transferred to Lucia M. Fish by the deed from the plaintiffs to her; and the assignee of a chose in action has the right (subject to the right of the assignor to require indemnity against costs) to sue in the name of the assignor. It is a matter of indifference to the defendant to whom he pays, if he is fully protected against any further liability. It is not claimed that there is any other party but Leonard Fish and wife that could make any claim against the defendant on account of his covenants; and the discharge filed in the case is a full protection against any claim that they might otherwise make. The rule of law that limits the recovery in actions of covenant against encumbrances to the amount paid to remove the encumbrance was adopted for the protection of the covenantor, for until full payment the liability of the covenantor would continue. The cases relied upon by the defendant differ from this in the important fact that in none of those cases did it appear that the suit was being prosecuted for the benefit of an assignee who had been compelled to make payment to save his estate, and full indemnity had been tendered to the covenantor. The attempted defence is purely technical; and it does not appear that any defence which the defendant might have made if the suit had been in the name of Leonard Fish and wife was not

equally available to him in the present suit. In *Smith v. Perry, Admr.*, 26 Vt. 279, the plaintiff had not paid the judgment recovered by his grantee on account of the breach of his covenant of title, but the court allowed a full recovery to be had, protecting the defendant's estate against further liability by the form of the judgment rendered. Here, as we have seen, the defendant is protected by the discharge filed.

*Judgment reversed, and judgment for the largest sum.*¹

GEISZLER v. DE GRAAF ET AL., AS EXECUTORS

166 N. Y. 339. 1901.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 17, 1899, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court, and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

O'BRIEN, J. The plaintiff is the remote grantee of lands which the defendants' testator owned on the 29th day of January, 1892, and on that day conveyed to one Knabe by deed with full covenants. At the time of this conveyance the lands were incumbered by a local assessment amounting to \$224.41, with interest. On the 12th day of March, 1892, Knabe conveyed the lands to one Breirly, expressly subject to the assessment, and on the 2d day of October, 1893, the latter conveyed to the plaintiff with a covenant against incumbrances. On the 23d day of October, 1896, the plaintiff was obliged to and did pay the assessment, amounting at that date to \$341.31, in order to discharge the lien upon the land, and he now seeks to recover that sum with interest from the personal representatives of the original grantor from whom the title was derived.

The plaintiff cannot recover without establishing two propositions of law: (1) That the benefit of the covenant against incumbrances contained in the deed of the defendants' intestate to Knabe passed to the plaintiff through the intermediate conveyances. In other words, that it ran with the land. (2) That the continuity of the covenant was not interrupted or its benefits extinguished as to the plaintiff by the fact that his immediate grantor took the title expressly subject to the assessment or incumbrance which is the basis of the action.

The right of a remote grantee of real estate to recover damages for breach of the covenants in the deed has been exhaustively discussed in a recent case in this court, and the point in that case was settled only after four appeals and then by a bare majority of this

¹ See *Simons v. Diamond Match Co.*, 159 Mich. 241.

court. But in that case the question that we are now concerned with was not involved, since the action was upon the covenant for quiet enjoyment and warranty made by a stranger to the title, and it was held that under the circumstances of the case the covenant of the stranger was personal and did not run with the land. The case turned upon the point that there was no such privity of estate or contract between the husband who had joined with the wife in the covenant and the plaintiff as would attach the covenant to the land and carry liability through the chain of title to a remote grantee. (*Mygatt v. Coe*, 152 N. Y. 457; 147 N. Y. 456; 142 N. Y. 78; 124 N. Y. 212.) That was a very different question from the one now before us, which is simply whether the covenant against incumbrances runs with the land so as to enable a remote grantee to recover upon it.

We can decide the case upon another question, comparatively insignificant, and leave the principal controversy open for litigants to grope their way through conflicting decisions to some conclusion as to what the law is on the subject. But the right of a remote grantee to recover for breach of the covenant against incumbrances is a question arising almost every day, and a court of last resort should meet it when presented and settle the law one way or the other.

It was the general rule of the common law that all covenants for title ran with the land until breach. In this state it has been held that a breach of the covenants of seizin, or right to convey and against incumbrances occurred, if at all, upon delivery of the deed; while those for quiet enjoyment, warranty and for further assurance were not broken until an eviction, actual or constructive. (Rawle on Covenants, [5th ed.,] § 202 and note.) And it has been generally held that those of the former class do not run with the land, while the latter do. The foundation of this distinction is not clearly traceable among the early English decisions. The principal reason for it, however, seems to have been that at common law no privity of estate or tenure existed between a covenantor and a remote covenantee, and, therefore, when a breach of a covenant of title occurred, if it was not such a covenant as was affixed to the land and ran with it, it could not be taken advantage of by a remote covenantee or a stranger to the original covenant, since it was, as to him, a mere chose in action, and at common law choses in action were not assignable. But now choses in action are assignable, and the question is whether the ancient law concerning the covenant against incumbrances has survived the reasons upon which it was founded. The operation of the common-law rule upon the grantee seeking to enforce the covenant against incumbrances was always inconvenient, and the rule itself exceedingly illogical. While it was held that the breach occurred upon delivery of the deed, it was also held that the covenantee could not recover more than nominal damages until he had paid off the incumbrance, or had been actually or constructively

evicted. (*Delavergne v. Norris*, 7 Johns. 358; *Hall v. Dean*, 13 Johns. 105; *Stanard v. Eldridge*, 16 Johns. 254; *Grant v. Tallman*, 20 N. Y. 191; *McGuckin v. Milbank*, 152 N. Y. 297.) It was virtually held that when the incumbrance was a money charge which the grantee could remove there were two breaches of the covenant, one nominal, entitling the party to but nominal damages, and the other substantial, to be made good by the actual damages sustained and an action and recovery for the first breach was no bar to an action and recovery for the second. (*Eaton v. Lyman*, 30 Wis. 41; s. c. 33 Wis. 34.)

This rule did not apply to permanent incumbrances which the covenantee could not remove, such as easements and the like, since he had the right in those cases to bring his action immediately on the breach and recover just compensation for the real injury. A learned writer commenting on the condition of the law of covenants as it formerly existed stated the situation quite accurately in the following language: "It is evident from these cases that the current of American authority tends, with but little exception, towards the position that on total breach a covenant, though annexed to the realty, becomes a merely personal right, which remains with the covenantee or his executors, and does not descend with the land to heirs, nor run with it on any future assignment to third parties. The result of this doctrine, as generally applied in this country, is to deprive covenants which, like those for seizin or against incumbrances, if not good, are broken instantaneously, of all efficacy for the protection of the title, in the hands of an assignee, even when the loss resulting from the breach has fallen solely upon him. Thus the right of action on covenants, originally intended for the benefit of the inheritance in all subsequent hands, is denied under this course of decision, to the purchaser of the land, although the party really injured." (Smith's Leading Cases, vol. 1, p. 192, note by Hare & Wallace.) In England the law became so uncertain in this respect, as the result of conflicting decisions (*Kingdon v. Nottle*, 1 M. & S. 355; s. c. 4 M. & S. 53; *Spoor v. Green*, L. R. [9 Ex.] 99), that the controversy was set at rest by the enactment of a statute which provided that the covenants should run with the land unless otherwise restricted in the conveyance. (44 & 45 Vict. Ch. 41, § 7.) The same result has been accomplished in most of our sister states, either by judicial decision or by statute, where the covenant against incumbrances runs with the land.

In this state, since the enactment of the Code making choses in action assignable, it has been held that the covenant against incumbrances passes with the land through conveyances to a remote grantee. (*Coleman v. Bresnaham*, 54 Hun. 619; *Clarke v. Priest*, 21 App. Div. 174.) But it has been held in the case at bar that it does not, and that proposition is based upon the common-law rule and upon a former decision of the same court. (*S. T. S. Building Com-*

pany v. Jencks, 19 App. Div. 314.) With this conflict of views concerning the nature and effect of the covenant against incumbrances, and the remedy for a breach of it, this court should adopt the rule best adapted to present conditions and which seems most likely to conform to the intention of the parties and to accomplish the purpose for which the covenant itself is made. The covenant is for the protection of the title, and there is no good reason why it should not be held to run with the land, like the covenant of warranty or quiet enjoyment. The principle which was at the foundation of the common-law rule, that choses in action were not assignable, having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded.

We hold, therefore, that the covenant against incumbrances attaches to and runs with the land and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered.

But in this particular case, there is a fatal obstacle to the plaintiff's right to recover upon the covenant. The plaintiff's immediate grantor, as we have seen, purchased expressly subject to the incumbrance, and while he owned the land he could not take advantage of the original covenant made by the defendants' testator. The effect of his purchase, subject to the assessment, was to relieve the prior grantors from any liability to him on the covenant. Presumptively he was allowed in the purchase to deduct the amount of the assessment from the purchase price and he was, therefore, furnished by his grantor with the money to pay the assessment, and when he took the land and was furnished with the money to pay the incumbrance the obligation of the covenant was discharged and extinguished. He could not call upon any prior covenantor to pay the assessment, when they had furnished him with the funds to pay it himself. (*Vrooman v. Turner*, 69 N. Y. 280.)

It is true that he did not pay, but conveyed to the plaintiff with a covenant against incumbrances. But the plaintiff acquired only such rights as his immediate grantor could assert against prior grantors. The plaintiff's grantor did not transmit to him any cause of action against the defendants. The covenant in the plaintiff's deed is a new covenant, and not the assignment of an old one. On the new covenant the plaintiff's grantor is liable, but the liability extends only to him and cannot, through him, extend to prior parties. The plaintiff is under the same disability as his grantor, since he is in privity with him.

For these reasons the order should be affirmed and judgment absolute ordered for defendants on the stipulation, with costs.

PARKER, Ch. J., HAIGHT, LANDON, CULLEN and WERNER, JJ., concur; GRAY, J., concurs in result. *Ordered accordingly.*

Facts: - John King leased for years to A (def.). who by deed granted it to Abel & covenanted with him that he and his assignees should peaceably enjoy it without interruption. Abel grants it to J.S. [CHAP. IX] who grants the term to the pl., who being ousted by a stranger; quest. -

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NOKE v. AWDER

[CHAP. IX]

C. Covenants by Strangers to the Title.

NOKE v. AWDER

Cro. El. 373, 436. 1595.

COVENANT. Wherein he shows that one John King made a lease for years to A. the defendant, who by deed granted it to Abel, and covenanted with him, that he and his assignees should peaceably enjoy it without interruption. Abel grants it to J. S., who grants the term to the plaintiff, who being ousted by a stranger, brings this action; and after issue joined upon a collateral matter, and after verdict for the plaintiff, it was alleged in arrest of judgment, that this action lay not for the second assignee, unless he could show the deed of the first covenant, and of the assignment, and of every mean assignment; for without deed none can be assignee to take advantage of any covenant, which cannot commence without deed; and to that purpose cited Old Act, 102; and 19 Edw. 2; Covenant, 25. And if one be enfeoffed with warranty to him his heirs and assignees, and the feoffee makes a feoffment over without deed, the assignee shall not take advantage of this warranty, because he hath not any deed of assignment. But if he had the deed, it should be otherwise; and to that purpose vide 13 Edw. 3, Vouch. 17; 3 Edw. 3, *Monstrans de Fayts*, 37; 11 Edw. 4, Ibid. 164; 15 Edw. 2, Ibid. 44; 13 Hen. 7, 13 and 14, 22 Ass. plea, 88. But POPHAM held, that he shall have advantage without the deed of assignment; for there is a difference where a covenant is annexed to a thing, which of its nature cannot pass at the first without deed, and where not. For in the first case, the assignee ought to be in by deed, otherwise he shall not have advantage of the covenant; and therefore he denied the case of the feoffee with warranty; for the second feoffee shall have benefit of the warranty, although he doth not show the deed of assignment, but shows the deed of the warranty; and so is the better opinion of the books. And to that opinion the other Justices inclined. *Sed adjournatur.* Vide 3 Co. 63.

It was now moved again. And all the JUSTICES agreed, that the assignee shall have an action of covenant without showing any deed of the assignment; for it is a covenant which runs with the estate; and the estate being passed without deed, the assignee shall have the benefit of the covenant also; and the executor of the baron, who is assignee in law, who comes in without deed, shall have the benefit of such a covenant, as appears 30 Edw. 3, in *Symkins Simonds' Case*. And POPHAM and FENNER held, that a feoffee shall vouch by a warranty made to his feoffor, without showing any deed of assignment: for the deed of assignment is not requisite, nor it is to any purpose to show it; for it appears by the books, that being shown, it is not traversable by the vouchee. And as a warranty or covenant is not grantable, nor to be assigned over without the estate; so when the

Def. claimed no action lay here for 2nd assignee unless he could show the deed of the 1st covenant.

Def. claimed 2nd assignee need not show deed of assignment.

Assignee can have action of covenant without showing deed assignment for benefit of baron & c.

estate passeth, although it be by parol, the warranty and covenant ensue it; and the assignee of the estate shall have the benefit thereof. Coke, Attorney-General (who was of counsel with the defendant), said, that the law was clear as you have taken it, yet the declaration is ill; for he declares, quod cum Johannes King, 10 Eliz., let that to the defendant for years, virtute cuius he was possessed, and granted it to Abel by indenture with the covenant, who in 15 Eliz. assigned it to the plaintiff: and further allegeth, that long time before that the said J. K. had anything, one Robert King was seised in fee, viz., 7 Eliz., and so seised, died seised in 15 Eliz. and it descended to Thomas King, who entered upon the plaintiff and ousted him: so he doth not show that John King who made the lease had anything; for Robert King was thereof then seised. And then when John King let to the defendant, and he granted his term by indenture, nothing passed but by estoppel; then the lessee by estoppel cannot assign anything over, and then the plaintiff is not an assignee to maintain this action. But admitting that J. K. had at the time of the lease made by him, a lease for a greater number of years, and that Robert King had the freehold, and thereof died seised, and so all might be true which is pleaded; then the entry of Thomas King upon the defendant is not lawful. So *quacunque via data*, this action cannot be maintained. And this point for the case of estoppel was adjudged in this court, in the case of *Armiger v. Purcas*, in a writ of error.

And all the Court held here, that it was clear upon the matter shown, that the action lay not; for the plaintiff ought to have shown an estate by descent in J. King, at the time of the lease and assignment made, or an estate whereby he might make a lease, and that this was afterwards determined; and so confess and avoid the estate in the lessor, otherwise this action of covenant lieth not, and it never lies upon the assignment of an estate by estoppel. Wherefore they were of opinion to have then given judgment against the plaintiff; but afterward they would advise until the next Term. — NOTE. This was continued until Trin. 41 Eliz., and then being moved again, all the JUSTICES resolved, that the assignee of a lease by estoppel, shall not take advantage of any covenant; but that it shall not be intended a lease by estoppel, but a lawful lease. But no sufficient title being shown to avoid it, it is then as an entry by a stranger without title, which is not any breach. Wherefore it was adjudged for the defendant.¹

¹ See Rawle, Covenants for Title, 5th ed., §§ 232-236; 1 Smith, L. C., 11th ed., 95 *et seq.*

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notes

Coke
178
notes

Cor. never
lies on
assignment
of estate by
estoppel.

ANDREW v. PEARCE, EXECUTOR OF BEST

1 B. & P. N. R. 158. 1805.

SIR JAMES MANSFIELD, C. J.¹ This is an action of covenant, and the declaration states that Peter Best in 1764 demised the premises in question for 99 years to John Garland, and covenanted that he had good right to make such demise, and that Garland should quietly enjoy the premises during the said term; that Garland in 1791 assigned to Bennett, and Bennett in 1801 assigned to the plaintiff, who was ejected by Thomas Pearce under a title superior to that of Peter Best. The plea states that Peter Best, at the time of the demise, was seised of the premises in tail male, and, before the assignment by Bennett to the plaintiff, died so seised without heirs male of his body, whereupon the term of years ceased and determined. Upon these pleadings, it is clear that Peter Best had no power to make a demise of these premises to continue for 99 years if he should die without issue male; but that it was a good lease so long as he should live, and he might have lived till the end of 99 years. On this demurrer every fact is admitted. It is clear, therefore, that at the time when Bennett assigned to Andrew, Bennett had no interest in the premises; the lease is stated to have become absolutely void by the death of Peter Best without heir male. The lease then having become absolutely void, what could be the operation of the assignment by Bennett to Andrew? He could neither assign the lease nor any interest under it, because the lease was gone. What right of any sort had Bennett? If anything, it could only be a right of action on the covenant, and that could not be assigned by law. As the person who made the assignment had no interest in the premises, the assignment itself could have no operation. Consequently there is no ground upon which the present action can be maintained, and therefore judgment must be given for the defendant.

*Judgment for the defendant.*²

BEDDOE'S EXECUTOR v. WADSWORTH

21 Wend. (N. Y.) 120. 1839.

DEMURRER to declaration. This was an action on covenants of warranty and for quiet enjoyment, contained in a deed of land, dated July 7th, 1797, executed by the defendant to John Johnston. Each count (there being six in all) averred that afterwards, viz., on the same day, the defendant by Johnston's direction, and with his con-

¹ Only the opinion is given.

² Compare *Cuthbertson v. Irving*, 4 H. & N. 742.

sent, surrendered *possession* of the land to the testator, John Beddoe, who *continued in possession* until Johnston, on the 16th August, 1802, by indenture, in consideration of *one dollar*, therein expressed as in hand paid by Beddoe, did "remise, release, and forever quitclaim unto the said John Beddoe, his heirs and assigns forever, all the right, title, interest, claim or demand, which the said John Johnston, &c., had in or to the said tract, &c., to have and to hold the said tract, &c., unto the said John Beddoe, his heirs and assigns forever, to his and their own proper use, benefit and behoof, &c." Each count stated an eviction from part of the premises, while in possession of persons claiming under John Beddoe, the plaintiff's testator, and during the lifetime of the testator. The eviction was alleged to have been in virtue of a title in one Rachel Malin. All the counts except the sixth stated this title to be paramount to the defendant's; and all except the *fifth* averred that the plaintiff, *as executor*, had thereby incurred damages and costs. The *fifth* count averred that the *testator* in his lifetime, and the *plaintiff* since his death, had been obliged to pay them.

The *first* and *second* counts averred that the defendant's deed to Johnston was given to and received by Johnston for and in behalf of Beddoe, the testator, and for his benefit.

All the counts except the third, concluded as for a breach of the covenant for *quiet enjoyment* only; the third was for a breach of the covenant of *warranty* only. But the deed as set forth in each count in fact contained covenants of seisin, of warranty, for quiet enjoyment, and further assurance. The defendant *demurred* to each count.

BY THE COURT. (COWEN, J.) If the covenants of warranty and for quiet enjoyment passed by the quitclaim deed from Johnston to the plaintiff's testator, the right of action sought to be shown by the declaration seems to be clear in all the counts except the sixth. This count is defective in not averring that the eviction was by a title paramount to that of the defendant. *Webb v. Alexander*, 7 Wendell, 281; *Luddington v. Pulver*, 6 Id. 404 to 406; *Greenby v. Wilcocks*, 2 Johns. R. 395; *Ellis v. Welch*, 6 Mass. Rep. 246; *per* Savage, C. J., in *Rickert v. Snyder*, 9 Wendell, 421, 422; 4 Kent's Com. 479, 3d ed. *Non constat* but Rachel Malin may have proceeded to eviction upon a right derived from Johnston or the testator himself. In the other five counts, however, there is enough to show that during the lifetime of Beddoe the testator, he either became personally liable on covenants to his grantees as to a part of the premises from which they were evicted by a title superior to the defendant's, or suffered an injury in an eviction of his tenant by a like superior title. Then it is averred either that the plaintiff was compelled to pay damages and costs as executor, or, according to the fifth count, the testator in his lifetime was obliged to pay a part, and the plaintiff another part after his death. In either case, the right of action pertained to the testator personally. The covenant was broken by the eviction, and

the whole damages were due (Hosmer, C. J., in *Mitchell v. Warner*, 5 Conn. R. 504 to 506), the right to which passed on his death, not to his heir, but to his personal representative. *Hamilton v. Wilson*, 4 Johns. R. 72. A covenant real ceases to be such when broken, and no longer runs with the land. It would not go to the heir by death, for the same reason that it could no longer follow the land into the hands of a devisee or grantee. See *Markland v. Crump*, 1 Dev. & Bat. 94, 101; *Kingdon v. Nottle*, 1 Maule & Sel. 355; s. c. 4 Id. 53.

This view of the case disposes of all the minor objections raised by the demurrers. There must be judgment for the defendant on the sixth count, and for the plaintiff on all the others, unless either the first or second point taken by the defendant's counsel is sustainable. These are each applicable to the remaining five counts.

The first point is, that it appears from five of the counts, that when the defendant conveyed to Johnston, he, the defendant, had no title; and as no estate therefore passed to the plaintiff's testator, the covenants were not assigned; that covenants pass only as *incidents* to an estate; and if there be none, the covenants cannot be said to be annexed to an estate, much less to pass with it. The point seems to suppose that these covenants can never be transferred where there is a total want of right in the original covenantor, though his deed transfer the actual possession. It seizes on the phrase in 4 Kent's Com. 471, note b, 3d ed., and other books, "that they cannot be separated from the land and transferred without, but they go with the land as being *annexed to the estate*, and bind the parties in respect to *privity of estate*." No New York case was produced which denies that they pass where the *possession* merely goes from one to another by deed, and there is afterwards a total failure of title; but there are several to the contrary. *Withy v. Mumford*, 5 Cowen, 137; *Garlock v. Closs*, 5 Id. 143, n. And see *Markland v. Crump*, 1 Dev. & Bat. 94; *Booth v. Starr*, 1 Conn. R. 244, 248. Nor, when we take the word *estate* in its most comprehensive meaning, can it be said there is none in such a case to which the covenant may attach. It is said by Blackstone to signify the condition or circumstance in which the owner stands with respect to his property (2 Black. Com. 103), and a mere naked possession is an imperfect degree of title, which may ripen into a fee by neglect of the real owner Id. 195, 6. It is, in short, an inchoate ownership or *estate* with which the covenants run to secure it against a title paramount; and in that sense is assignable within the restriction insisted upon. It is said in several cases that the covenants of warranty and quiet enjoyment refer emphatically to the *possession* and not to the *title*. *Waldron v. M'Carthy*, 3 Johns. R. 471, 3, per Spencer, J.; *Kortz v. Carpenter*, 5 Id. 120. The meaning is, that however defective the title may be, these covenants are not broken till the possession is disturbed. When the latter event transpires, an action lies to recover damages for the failure both of possession and title according to the extent of such failure.

The case of *Bartholomew v. Candee*, 4 Pick. 167, was mainly relied upon in support of the ground taken by the first point. All that case decides is, that a covenant no longer runs with the land after it is broken. The declaration was by the grantee of one Thorp, to whom the defendant had conveyed in fee with covenants of seisin and warranty; and breaches were assigned upon both. The defendant pleaded and the jury found, that before the defendant conveyed to Thorp, he had conveyed to one Sparks, who entered and died actually seised, leaving the land to his children, who were still actually seised when the defendant conveyed to Thorp. Mr. Justice Wilde arrives at the conclusion that the covenant of seisin was broken before the deed from Thorp to the plaintiff; and adds: "This point being established, it is perfectly well settled that no action will lie on this contract in the name of the assignee. By the breach of the covenant of seisin, an action accrued to the grantee, which, being a mere *chose in action*, was not assignable." He does not notice the covenant of warranty, but seems to consider the claim under that as standing on the same ground; which I think might well lie under the pleas as found by the jury. The fair import of these was, that neither Thorp nor the plaintiff ever had possession; so that, according to some cases, the covenant of warranty was also immediately broken; *Duval v. Craig*, 2 Wheat 45, 61, 62; *Randolph v. Meak*, Mart. & Yerg. 58; and according to our own it never could have any effect. No possession ever having been taken under the deed, there could be no actual eviction, which is said to be essential to a recovery upon a covenant of warranty. *Webb v. Alexander*, 7 Wendell, 281 to 284, and the cases there cited; *Jackson ex dem. Montessor v. Rice*, 3 Wendell, 180, 182, *per Savage*, C. J.; *Vanderkarr v. Vanderkarr*, 11 Johns. R. 122. See a very full collection and consideration of the cases to this point, both as it respects the covenant of warranty and for quiet enjoyment, by Hosmer, C. J., in *Mitchell v. Warner*, 5 Conn. R. 521 to 527. That an unbroken covenant of warranty shall run with the possession of the land, was not questioned by counsel or court in *Bartholomew v. Candee*, nor was it in a subsequent and similar case, *Wheelock v. Thayer*, 16 Pick. 68, also relied upon. I have looked through the other cases cited by the counsel for the defendant, and they all go to the point, either that a covenant broken ceases to be assignable, or that covenants in gross are not so. These positions are indisputably settled; and we have adopted the first, in order to show that this action was properly brought by John Beddoe's executor instead of his heir. I do not except from this remark the case of *Andrew v. Pearce*, 4 Bos. & Pull. 158. It is true that was an action on covenants both that the defendant had authority to demise and for quiet enjoyment. The title failed before the plaintiff took an assignment; he entered and was ousted; and it was held that he could not recover, because the mere failure of the title broke the covenants. Mansfield, C. J., said expressly, the assignor had only a right of

action left, which he could not assign. It would seem by this case that in England a similar failure of title, without eviction, would be a breach of the covenant for quiet enjoyment. With us the doctrine is clearly otherwise. *Kortz v. Carpenter*, 5 Johns. R. 120; *Norman v. Wells*, 17 Wendell, 160, and the cases there cited; and see *Mitchell v. Warner*, 5 Conn. R. 497, 522, and the very full reference there to the New York cases. In *Andrew v. Pearce*, the lease was treated as totally gone, by a failure of the title; whereas there was still a continuing possession, till the plaintiff was ousted, and then and not till then, according to our cases, was the covenant for quiet enjoyment broken. There is a difference in more respects than one between our own and the English cases as to what shall constitute a breach of the covenants of title, so as to take away their assignable quality. Even a covenant of seisin, made and broken in the same breath, is there held to run with the land, till actual damages are sustained by the breach. *Kingdon v. Nottle*, 1 Maule & Sel. 355; 4 Id. 53. Kent's Com. 471, 2, 3d ed., says the reason assigned for the decision is too refined to be sound. The case is followed by *Backus' Admr. v. McCoy*, 3 Ham. Ohio R. 211; but severely criticised in *Mitchell v. Warner*, 5 Conn. R. 497 to 505. Kent's Com. *ut supra*, note a.

But secondly, if the covenant be in its own nature available to the assignee as a protection against the total failure of the defendant's title, and if it be assignable by a grant of the land, it is insisted that none of the counts in the declaration show that such a grant was made from Johnston to the plaintiff's testator. All the counts stop with averring that Johnston, for the consideration of one dollar, *remised, released and forever quitclaimed* to the testator in fee. Technically, these are but words of release; and as no previous lease from Johnston to the testator is shown, it is supposed that the granting words are inoperative. This objection supposes that the words used cannot carry the estate except as part of a conveyance by lease and release; and that, in order to give them effect, a lease should be shown, either by its production and proof, in the usual way, or its recital in the release; and this formal strictness would seem still to prevail in England. *Doe ex dem. Pember v. Wagstaff*, 7 Carr. & Payne, 477. In *Bennett v. Irwin*, 3 Johns. R. 365, 366, Van Ness, J., said, a mere release or quitclaim, unless the releasee is in possession, is void. But the declaration, in the case at bar, shows that the grantee was in possession. Even this strictness was, however, totally exploded, by the case of *Jackson ex dem. Salisbury v. Fish*, 10 Johns. R. 456, the operative words as set forth in the declaration being held of themselves sufficient to raise and execute a use under the Statute. The conveyance was there held good as a bargain and sale. Had that case occurred to counsel, we should doubtless have been saved the examination of this objection; for we do not remember its being denied on the argument that words which are sufficient to pass a fee in conveyancing are equally sufficient in pleading by way of averment.

The demurrers are overruled as to all the counts except the sixth, and judgment must be given for the plaintiff.

The demurrer to the sixth count is well taken, and judgment must be given for the defendant as to that count, with leave to both parties to amend.

SLATER AND ANOTHER v. RAWSON

1 Met. (Mass.) 450. 1840.

DEWEY, J.¹ This is an action to recover damages for the breach of certain covenants in a conveyance of land made by the defendant to Samuel Slater and John Tyson, through whom, by sundry conveyances, the plaintiffs derive their title as assignees and subsequent purchasers. The covenants in the deed of the defendant are in the usual form, embracing the covenants of seisin and right to convey, a covenant against encumbrances, and also a covenant of warranty. The breach alleged in the declaration is, that one Elisha Jacobs, having an elder and better title than that of the defendant, entered upon the land, claiming title thereto, and that the plaintiffs, admitting his superior title, voluntarily surrendered the possession to him. To establish the title of Jacobs, the plaintiffs offered in evidence a deed from one John Rawson to William Sears, dated May 6th, 1782, and sundry other deeds conveying this title, as derived from Sears, and vesting it in Jacobs. The defendant admitted that the deed from John Rawson was prior in time, to that under which he claimed to have acquired title; but he contended that the deed of Rawson to Sears did not include the land which the plaintiffs had thus voluntarily surrendered to Jacobs. This presented a question of boundary, and much evidence thereon was submitted to the jury.²

The only other question, upon which any opinion in matter of law was given at the trial before the jury, was upon the subject of damages. The jury were directed, if they should find for the plaintiffs, to assess the damages at the value of the land at the time of the voluntary surrender of it by the plaintiffs upon the entry by Jacobs, with interest from that time; and this, as we understand, is not denied by the defendant's counsel to be the correct rule for assessing the damages, if the plaintiffs can maintain their action. But upon the argument before us, upon the case as stated by the parties, the defendant insists, that as he was not seised of the land, which is now the subject of controversy, at the time he executed the deed to Slater and Tyson, and so nothing passed by his deed to his immediate grantees, and they therefore could pass no estate, nor any covenants, to an assignee, which would authorize an action in his own name, he is not liable to the plaintiffs, to any extent, on his covenants.

¹ The opinion only is given.

² The part of the opinion relating to the question of boundary is omitted.

The distinction as to the legal effect of the different covenants usually introduced into our conveyances, however little it may have been understood or regarded prior to the cases of *Marston v. Hobbs*, 2 Mass. 433, and *Bickford v. Page*, 2 Mass. 455, is now very well settled. The covenants of seisin and right to convey are to all practical purposes synonymous covenants; the same fact, viz. the seisin in fact of the grantor, claiming the right to the premises, will authorize both covenants, and the want of it is a breach of both. But upon these covenants no action can be maintained in the name of an assignee or subsequent purchaser; for if broken at all, they are necessarily broken at the moment of the execution of the deed; and not running with the land, they do not pass by a subsequent conveyance of the land. The covenant of warranty, on the other hand, is a covenant running with the land, and may be made available to a subsequent purchaser, however remote, if the conveyances are taken with proper words to pass the covenant. But to support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seised of the land; for, by a conveyance without such seisin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach. If therefore the defendant, at the time of the making of his deed to Slater and Tyson, was not seised, then the covenant of warranty did not pass to the plaintiffs as assignees, and the only liability of the defendant is upon his covenant of seisin, which covenant, for the reasons already stated, is wholly unavailable to the plaintiffs.

It is to be taken as established by the finding of the jury, and is also in accordance with the pleadings on the part of the plaintiff, that the defendant, at the time of making his conveyance, had no legal title to the twenty-two acres of land, which the plaintiff has yielded up to the claim of Jacobs; but that the title to the same was then, and had been for a long period previously, in William Sears and those claiming under him. The further inquiry then is, whether the defendant was seised in fact of these premises, claiming right thereto, at the time of executing his deed to Slater and Tyson.

The case, as stated by the parties, in the report, finds that the premises, which are the subject of this controversy, were a part of a large tract of woodland unenclosed by fences, and of which there had been no actual occupation by any of the parties. Taking these facts to be correctly stated, there was clearly no seisin in fact, in the defendant, acquired by an entry and adverse possession. The rule, as to lands that are vacant and unoccupied, that the legal seisin follows the title, seems to be applicable here; and having ascertained in whom is the legal title, that also determines in whom the seisin is. But the plaintiffs have alleged in their declaration, and established by their evidence, the fact that the legal title to the land surrendered

was not in the defendant at the time of the execution of the deed by him, but was in those who claim under William Sears. It being thus shown that there was no seisin in fact, nor any legal title to the premises, in the defendant, it necessarily follows that the covenants of seisin and right to convey were broken, and that nothing passed to Slater and Tyson, which they could transfer to the plaintiffs as the foundation of an action in their own name. The covenant of seisin was broken at the moment of the execution of the deed, and became a mere chose in action not transferable; and the covenant of warranty is wholly ineffectual, as no land passed to which it could be annexed; and the result, therefore, from this view of the case, is that the plaintiff cannot maintain his action.

It was said in the argument, that the defendant should be estopped to deny his seisin, and thus avoid the covenant of warranty, because by his own deed he has affirmed it, and that should be conclusive against him. Without deciding whether such estoppel might or might not, under any circumstances, be interposed where there are various covenants in a deed, and the party be thus subjected, at the election of the covenantee, to damages different from those which the law has prescribed for the covenant which is actually broken; or, in the case of an assignee, to allow him to recover for the breach of a covenant which is shown in fact never to have passed to him; it seems to us clear, that in the present case no such objection can avail, as the plaintiff, in his declaration, and by his own showing, has established the fact that the defendant had neither the seisin nor the legal title to the land conveyed.

It was further suggested, upon the argument, that the ground of defence now principally relied on, that the covenant of warranty did not pass to the plaintiffs, in consequence of the want of seisin in the defendant, is not open to the party; not having been presented in this form at the trial before the jury. As a general rule, questions must be raised at the trial, or they will not be open here; and for the very obvious reason, that the opposite party may have the proper opportunity to supply any defects in his proof upon the points excepted to. But as, in the present case, the facts, as stated in the report, and as they appear to be conceded by both parties, show the objection, now urged and relied upon in defence, to be one that could not be obviated by any further proof on the part of the plaintiff, the court have felt themselves authorized to consider that point as open, and have disposed of it in the manner already stated. The result is, therefore, that upon the case as now stated, the plaintiff cannot maintain his action.

*New trial ordered.*¹

¹ On the new trial, the case was saved for the consideration of the full court, and it was *held*, that, the defendant being proved to have been in possession of the land at the time of his deed to Samuel Slater and John Tyson, his covenant ran with the land to their assignees. s. c. 6 Met. (Mass.) 439.

See *Libby v. Hutchinson*. 72 N. H. 190.

WEAD v. LARKIN ET AL.

54 Ill. 489. 1870.

APPEAL from the Circuit Court of Cook County; the *Hon. E. S. Williams*, Judge, presiding.

This was an action of covenant, brought by Joshua Larkin and others against George F. Harding and Hezekiah M. Wead. The declaration alleges the breach of a covenant of warranty contained in a deed of conveyance, executed by the defendants to Curtis Worden and Albert Worden, and that the father of the plaintiffs, by conveyance from those grantees, became the assignee of their title, and of the covenant of warranty, and that the plaintiffs succeeded to the same rights by the death of their father.

The form of the covenant counted on is as follows: "And we, the said George F. Harding and H. M. Wead, for ourselves and our heirs, do covenant to and with the said Curtis Worden and Albert Worden, their heirs and assigns, that we will forever warrant and defend the title to said tract of land against all patent titles whatever, and against none other."

A trial resulted in a finding and judgment in favor of the plaintiffs. The case is brought to this court by appeal.

The appellant contends that the action will not lie, because, at the time they executed the deed containing the covenant sued upon, the covenantors were not in actual possession of the land, and had no estate in it of any kind, and therefore the covenant did not run with the land, and the grantee of the immediate covenantee cannot sue.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the court:

This case has been twice before this court, and will be found reported in 41 Ill. 415, and 49 Ill. 99. The facts are set forth in the opinion in 41 Ill. and it is unnecessary to repeat them here. After a third verdict and judgment against the defendants in the Circuit Court, they again bring the record here and submit it upon a question which has not hitherto been raised. It is now for the first time claimed, that the action will not lie, because the defendants, at the time they executed the deed containing the covenant upon which they are now sued, were not in actual possession of the land, and had no estate in it of any kind. It is contended, in such cases, the covenants in a deed do not run with the land, because there is no estate to which they can attach, and, therefore, the grantee of the immediate covenantee cannot sue.

It is true, it has been held by the current of authorities, that the covenants of seisin, of a right to convey, and that the land is free from encumbrances, being *in presenti*, if broken at all, are broken as soon as made, and becoming at once mere choses in action, do not run with the land, or, in other words, do not pass to the grantee of the immediate covenantee. But, even on this point, there is some

contradiction in the authorities, the King's Bench having held, in *Kingdon v. Nottle*, 1 Maule & S. 355, and 4 Ib. 53, that the assignee might sue, on the ground that the want of seisin is a continuing breach. So, too, it was held in *Admr. of Backus v. McCoy*, 3 Ohio, 211, that the covenant of seisin runs with the land, so long as the purchaser and the successive grantees under him remain in possession, and the rule is enforced by the court with very cogent reasoning.

But if it be true that these covenants *in presenti* cannot be made the basis of an action by the assignee, it is not denied that the covenant of warranty, which is the covenant in the case at bar, runs with the land and protects the grantee of the covenantee. This was settled in *Spencer's Case*, 5 Coke, and has probably never since been denied. It is claimed, however, in behalf of appellant in the present case, that, although this covenant runs with the land, yet, if the covenantor has neither actual possession nor legal title, there is no estate to which it can attach, and it does not pass to the grantee of the covenantee.

In support of this position, counsel cite the case of *Slater v. Rawson*, 1 Metc. 456, and it must be admitted, this doctrine is there announced. The court say: "To support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seised of the land, for by a conveyance without such seisin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach." It is, however, admitted by the court, that if the covenantor is seised in fact, though without title, the covenant does attach and pass to the assignee, and when the same case came again before the court, at a subsequent term, as reported in 6 Metc. 442, the plaintiff was allowed to recover, on the ground, that the covenantor had cut timber and hoop poles from the land, and thus had such a seisin as caused his covenants to attach to the land and pass to the grantee of the covenantee.

Notwithstanding our great respect for that court, this seems to us a very striking instance of the sacrifice of substance to shadow — the true meaning and spirit of a rule, to the mere form of words in which it has been found convenient to express it.

A reason at least technically sound, whether in fact satisfactory or not, can be given why covenants *in presenti* do not pass to the assignee. The reason assigned for this rule by the courts which maintain it, is, as already stated, that these covenants, if broken at all, are broken as soon as made, and the covenantee thus acquires a mere chose in action, which, under the rules of the common law, cannot pass to an assignee by a conveyance of the land. But not so with the covenant of warranty. That operates only *in futuro*, and is only broken by eviction. It is admitted that it attaches to the land and passes to the assignee, if the covenantor has a seisin in fact, though a wrongful seisin. Why, then, should it not pass to the

assignee of the covenantee, if the land is vacant at the time the covenant is made, and the covenantee, as in the present case, enters under his deed and then conveys? If the land were adversely held at the time of the first conveyance, and if the common law, rendering such a conveyance void, were still in force, it might be said, the covenants were void as to the covenantee. But it is admitted in the case at bar, as it was in the Massachusetts case, that the covenant was a valid covenant to the covenantee, even though the covenantor was not in possession of the land. But, it was said it did not pass to the assignee, because it attached to the estate, and the assignee took no estate. Yet, if a wrongful seisin on the part of the assignor would cause it to attach to the estate, and pass to remote grantees, and if, in the absence of seisin by the covenantor, the covenant was valid to the covenantee, as is admitted, we should like to inquire why, as soon as the covenantee took possession of the vacant land, the covenant did not then at once attach to the land, and pass with the conveyance of the covenantee? If the question of possession is at all important in reference to the passing of this covenant to an assignee, it is not the possession of the covenantor that is material, but that of the covenantee when he makes his conveyance. Then is the first time that the covenant passes as attached to the estate. When first made, it is made to the covenantee directly and in person, and he takes its benefit by virtue of his contract, and not as an incident to the estate. It can certainly never be held, that if he takes possession and is evicted by paramount title, he cannot recover, because the land was vacant when the deed was made to him. Even then, if we concede that he must take possession before he can pass the covenant to his grantee, as attached to the land, we are wholly unable to see why it does not pass if he has taken possession, or what the possession or non-possession of the covenantor, when the covenant was made, has to do with its passing to the grantee of the covenantee. The cases of *Moore v. Merrill*, 17 N. H. 81; *Beddoe's Exrs. v. Wadsworth*, 21 Wend. 120, and *Fowler v. Poling*, 6 Barb. 166, cited by counsel for appellant, so far from being inconsistent with the position we have here taken, seem rather to support it. The last case was first heard at special term before a single judge, and is reported in 2 Barb. 306. It was held, as in the Massachusetts case, that as the covenantor had no possession, the covenant did not pass to the assignee. An appeal was taken to the General Term, and it was there held, the conveyance by the covenantee in possession passed the covenant to the assignee.

The case of *Nesbitt v. Nesbitt*, 1 Taylor N. C. Rep., also cited by counsel for appellant, was one in which the grantors, by the face of their deed, did not purport to convey their own land, but that of their daughter, and covenanted that she should make good the title on her coming of age. The court held the covenants were collateral to the title, and did not pass to the assignee. The decision is based on

the peculiar character of the deed and covenants. The question was, whether the covenants in the peculiar deed before the court could pass to an assignee, and did not turn upon the question of possession.

Our conclusion is, that where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee, although the covenantor may not have been in possession at the time of his conveyance. This is the case at bar.

It is not, however, to be supposed, because we do not now lay down a broader rule than is required by the case before us, that we hold, by implication, the covenants would not pass if the immediate covenantee should convey before taking possession. On the contrary, it would much better comport with the interests of this State, where vacant lands are so largely an article of commerce, to hold that the covenantor, whether sued by an immediate or remote grantee, is estopped by his deed from denying that he had an estate in the lands to which his covenants would attach, and which would pass by deed. The covenant, it is true, passes to the assignee as appendant to the land, but this does not mean the actual title to the land, for, in such cases no covenants would be needed. They are intended as a protection to the covenantee and his assignees, in case the covenantor has no title, and it is a very extraordinary mode of reasoning which leads to the conclusion, that, if the covenantor's want of title is also accompanied by a want of possession, for that reason he should be excused from liability to the remote grantee. We should be inclined rather to say, that although the covenant of warranty is attached to the land, and for that reason is said, in the books, to pass to the assignee, yet this certainly does not mean that it is attached to the paramount title, nor does it mean that it is attached to an imperfect title, or to possession, and only passes with that, but it means, simply, that it passes by virtue of the privity of estate, created by the successive deeds, each grantor being estopped by his own deed from denying that he has conveyed an estate to which the covenant would attach.

In the case at bar, the defendants conveyed to the Wordens, and in their deed covenanted with them, their heirs and assigns, that they would forever warrant and defend the premises against patent titles. The land was then vacant. The Wordens took possession under their deed, and subsequently sold and conveyed to Larkin, and delivered to him the possession. An action of ejectment was brought against him, pending which he died, and his heirs, the present plaintiffs, having been made parties, judgment passed against them, and they were evicted by a paramount patent title. The covenant of warranty in defendant's deed was never broken until then. It was never a mere chose in action in the hands of the immediate covenantees. No one but these plaintiffs has ever had, or can have, a right of action on this covenant. If they cannot have it, the covenant which was inserted in the deeds of defendants, in order to give perpetual security

to both immediate and remote grantees, has become a dead letter. And why? The only reason that can be given is, because the covenantors, instead of having a partial title or a tortious possession, had no title nor possession of any sort. Their security is to be found in the completeness with which their covenant has been broken. The reasoning does not commend itself to our judgment.

*Judgment affirmed.*¹

¹ *Tillotson v. Pritchard*, 60 Vt. 94, accord. See *Wallace v. Pereles*, 109 Wis. 316.

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601-611
X

CHAPTER X EXECUTION OF DEEDS

SECTION I SIGNING AND SEALING

COOCH AND ANOTHER v. GOODMAN

2 Q. B. 580, 596-598. 1842.

LORD DENMAN, C. J. said: "The first question is, whether it is necessary by the Statute of Frauds that a lease under seal should also be *signed*. The words of the first section are, 'all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages,' &c., 'made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only.'

"The plea in this case is framed in the very words of the plea in the case of *Cardwell v. Lucas*, 2 M. & W. 111, in which it does not seem to have occurred to the court or the counsel that the words 'signed by the *parties*,' &c., might apply only to instruments not under seal. It is now argued, that inasmuch as the previous words are 'made or created by livery and seisin only, or by parol,' the distinction apparently intended to be established by the Statute of Frauds was between estates or interests created by a formal instrument, and those created by mere matter *in pais*, which must be established by the fallible recollection of witnesses. Mr. Justice Blackstone, in his Commentaries, vol. ii. p. 306, lays it down that the Statute of Frauds has restored the old Saxon form of *signing*, and superadded it to sealing and delivery in a case of a deed. Mr. Preston, on the other hand, in his edition of Sheppard's Touchstone, p. 56, note 24, treats this passage in Blackstone as a mistake from not attending to the words of the Statute, and holds it clear that no signature is necessary in the case of a deed. It is curious that the question should now for the first time have arisen in a court of law, and perhaps as curious that it is not necessary now to determine it; for although the plea negatives signature only, and not sealing or delivery, by the plaintiffs and the deceased, yet it appears by the indenture, as set out on oyer, and thereby become part of the declaration, that it was not sealed by the plaintiffs." ¹

¹ See *Cherry v. Heming*, 4 Exch. 631, 636; 1 Williston, Contracts, § 206.

LORD SAY AND SEAL'S CASE

10 Mod. 40. 1711.

UPON a trial at bar in the Court of Queen's Bench, in an ejectment brought by the heirs at law against the Lord Say and Seal, who claimed as heir in tail;

The single question was, Whether or no a *common recovery* that was suffered in order to dock the entail, was good or not?

The objection to the recovery was, that there was no tenant to the *præcipe*.

To prove the recovery good, a deed bearing date of the twenty-third of October, 1701, directing the uses of the recovery, and the fine, viz. the chirograph of the fine, and common recovery, were produced.

[The court held that the fine had created a good tenant to the *præcipe*. This part of the case is omitted.]

After this, there was a deed of *bargain and sale* enrolled produced, which would have made a good tenant to the *præcipe* had the opinion of the court been against the plaintiffs, as it was for them.

But to this deed this objection was made, that it was a tripartite deed, and ran to this effect: "This indenture, made the day of , between of the one part, and of the second part, and of the third part, witnesseth, That for and in consideration of the sum of five shillings, to him in hand paid, hath given and granted, &c." Now here they said the person granting is wanting, "hath granted," without saying who hath granted, and consequently this deed passes nothing, and can therefore make no tenant to the *præcipe*.

The court was of opinion, that the deed was good. Had this been a tripartite deed, without this slip, there had been no doubt at all in the case; but the deed is tripartite, and "hath" in the singular number, and therefore all the doubt is to whom the "hath" refers. Deeds are to be interpreted, as much as possible, according to the intention of the parties. The case of *Haslewood v. Mansfield*, 2 Vent. 196, was a case upon pleading, where greater strictness is required, and therefore does not come up to the case in point. The case of *Trethewy v. Ellesdon*, 2 Vent. 141, does. Many are the instances where the penalties of bonds are put into very strange and even false Latin, and yet held good. See 1 Salk. 462; 3 Salk. 74. The case in question is the case of a bargain and sale, and therefore to be interpreted more favorably than a deed. By the common law, nothing passed by deed of bargain and sale but the use, and the remedy was only in chancery; but now Statute-law has passed the estate to the use. The intention of the deed is plain, if this deed do not make Lord Say grantor, as to him it would have no effect at all, who yet sealed it. According to the common rules of in-

denture, the words of the deed are the words of all the parties, but Lord Say is a party, therefore he has granted.

The truth of the matter was, that it being feared this slip in the deed would be fatal to the recovery, this other contrivance of the fine was judged to be the best way of supporting it.

Though the opinion of the court was clear and plain for the plaintiffs in both points, yet the Lord Say and Seal prayed a bill of exceptions.¹

CATLIN v. WARE²

9 Mass. 218. 1812.

THIS was a writ of *dower*, to which the tenant pleaded in bar:—
1st That the demandant's husband Joseph Catlin was never seised &c. on which issue was joined. 2d That the said Joseph, being seised in his demesne as of fee, on the 28th day of March, 1793, by his deed of that date duly acknowledged, &c., for a valuable consideration, bargained and sold the same land, in which the demandant claims her dower, to one David Horton in fee simple; and that the said Abigail, by the consent of her husband, for the consideration in the said deed expressed, and also of one dollar paid her by the said David, assented and agreed to the same deed of the said Joseph, and then and there by her act and consent, signified by her affixing her seal to the said deed, and subscribing her mark thereto, she being unable to write her name, barred herself of all right of dower in the same premises and every part thereof; by virtue whereof the said David became seised in fee of the same premises, free and exempt from all claim demand or right of dower of the said Abigail therein.

The demandant replied, that she did not by her act and consent signified, &c., bar herself, &c., and tendered an issue to the country, which was joined by the tenant.

The several issues thus joined were tried at the last April Term of this court in this county, before *Sedgwick*, J., from whose report it appears, that the seisin of the demandant's husband and her coverture were agreed, as alleged in the writ.

The tenant produced the deed of Joseph Catlin to David Horton, mentioned in the pleadings. It purported a conveyance in fee of the land, in which dower is demanded, and to it, after the name and seal of her husband, were set the demandant's seal and mark. But her name was not otherwise mentioned in the deed, nor were there any words therein purporting or implying a release of her right of dower. The deed was acknowledged by the husband, and recorded; but there was no acknowledgment by the wife.

¹ See *Dart v. Clayton*. 4 New R. 221.

² Part of the case is omitted.

On the part of the tenant it was insisted at the trial, that the latter issue was proved on his behalf. But the judge directed a verdict on both issues in favor of the demandant; referring to the decision of the court, the question whether that direction was right.

CURIA. Two objections, made to the deed read in evidence at the trial of this cause, have been replied to by the counsel for the tenant.

As to the second, the want of an acknowledgment by the wife, we think an acknowledgment unnecessary in the case. One party to a deed acknowledging it gives notoriety to it, and that is the whole that is necessary. Though a deed be acknowledged and recorded, yet on the issue of *non est factum* the execution of the deed is still to be proved, as if it had not been acknowledged. *Inhabitants of Worcester v. Eaton*, 11 Mass. R. 379; 13 Mass. Rep. 371. Neither was an acknowledgment by the wife necessary in order to make the deed binding on her. She must know her own acts, and is bound by such, as the law authorizes her to execute.

The other objection to this deed has much more weight in it, and is indeed fatal to the defence of the action. A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case, whatever may be conceived of the intention of the demandant in signing and sealing the deed, there are no words implying her intention to release her claim of dower in the lands conveyed which must have been, to give it that operation. It was merely the deed of the husband, and the wife is not by it barred of her right to dower.¹

THE AGRICULTURAL BANK OF MISSISSIPPI AND OTHERS v. RICE AND OTHERS

4 How. (U. S.) 225. 1846.²

ERROR to the Circuit Court of the United States for the Southern District of Mississippi. The opinion of the court presents the necessary facts and the questions decided.

TANEY, C. J., delivered the opinion of the court.

This being an action of ejectment, the only question between the parties is upon the legal title.

It is admitted in the exception, that Mary Rice and Martha Phipps, lessors of the plaintiff, were each of them, as heirs at law of Adam Bower, entitled to an undivided third part of the premises mentioned in the declaration, in fee-simple. In order to show title out of them,

¹ *Contra*, reluctantly, on the ground of established custom in New Hampshire, *Burge v. Smith*, 27 N. H. 332; and see *Woodward v. Seaver*, 38 N. H. 29.

Compare *Dinkins v. Latham*, 154 Ala., 90; *Isler v. Isler*, 110 Miss. 419.

² This case is printed from Mr. Justice Curtis's edition of the Reports of Decisions in the Supreme Court of the United States.

the plaintiffs in error relied upon the bond of conveyance and deed, mentioned in the statement of the case, both of which were signed and sealed by these lessors of the plaintiff, but were executed while they were *femes covert*.

As regards the bond, it would not have transferred the legal title, even if all the parties had been capable of entering into a valid and binding agreement. But as to the *femes covert* who signed it, it was merely void, and conferred no right, legal or equitable, upon the obligees.

The deed, also, is inoperative as to their title to the land. In the premises of this instrument, it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees, of the other part,—the husbands and the grantees being specifically named; and the parties of the first part there grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors; and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. The deed in question conveyed the marital interest of the husbands in these lands, but nothing more.

It is unnecessary to inquire whether the acknowledgment of the *femes covert* is or is not in conformity with the Statute of Mississippi. For, assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void.

The judgment of the Circuit Court is therefore affirmed.¹

¹ And so *Fite Porter & Co. v. Kennamer*, 90 Ala. 470; *Peabody v. Hewett*, 52 Me. 33, 49, 50; *Jason v. Johnson*, 74 N. J. L. 529. And compare *Flagg v. Bean*, 25 N. H. 49, 62, 63.

But see *Sterling v. Park*, 129 Ga. 309; *Hrouska v. Janke*, 66 Wis. 252.

A deed purporting to be a conveyance of land by Edward Jones, and acknowledged by him to be his deed, passes his interest in the land, although the signature thereto reads "Edmund Jones." So said by the Supreme Court of California in *Middleton v. Findla*, 25 Cal. 76 (1864).

But in *Boothroyd v. Engles*, 23 Mich. 19 (1871), the plaintiff in ejectment, to prove the transfer of the title to the *locus* from Hiram Sherman, a former holder, to one Rawles, under whom the plaintiff claimed, offered in evidence an office copy of a deed which purported to be a conveyance of the land from Hiram Sherman to said Rawles, and which Hiram Sherman had acknowledged to be his deed, but the signature to which read "Harmon Sherman." The court rejected the deed, and the plaintiff alleged exceptions, which were overruled by the Supreme Court of Michigan, the court holding that the deed was not admissible, at least until some "foundation had been laid to connect the two variant names."

WILLISTON, CONTRACTS, §§ 207-209; pages 413 to 420,
including the footnotes.

It is said by Lord Coke that a seal is wax on which an impression has been made, and that the wax without the impression would not constitute a seal.¹ But the common law has everywhere in recent times much relaxed this rule. Everywhere to-day any substance as, for instance, a wafer² attached as a seal to a document would be held sufficient. So an impression made upon the paper as in the case of the seals ordinarily used by notaries and corporations would be sufficient.³ It seems logically difficult starting from these recognized extensions of the early rule to deny validity to any written or printed addition to a document which was in fact intended as a seal, since ink is superimposed on the paper and an impression is also made on it; and many courts seem prepared to accept this consequence. Thus a scroll or scrawl has been held enough.⁴ So the word "seal,"⁵ or the letters L. S. (standing for *locus sigilli*).⁶

Perhaps the extreme limit was reached in a Pennsylvania case⁷ where it was held that a horizontal dash less than an eighth of an inch

¹ Institutes, Book III, 169.

² *Tasker v. Bartlett*, 5 Cush. 359. Apparently the relaxation was first brought about by presuming from the recitals in the deed that an impression with the finger was made on the wafer.

³ *In re Sandilands*, L. R. 6 C. P. 411, 412; *National Provincial Bank v. Jackson*, 33 Ch. D. 1, 11; *Hendee v. Pinkerton*, 14 Allen, 381; *Royal Bank v. Grand Junction Co.*, 100 Mass. 444, 97 Am. Dec. 115; *Beardsley v. Knight*, 4 Vt. 471, 479.

⁴ *United States v. Stephenson's Exec.*, 1 McLean 462; *Anderson v. Wilburn*, 8 Ark. 155; *Williams v. Greer*, 12 Ga. 459; *Harden v. Webster*, 29 Ga. 427, 429; *Eames v. Preston*, 20 Ill. 389; *Trasher v. Everhart*, 3 G. & J. 234; *Line v. Line*, 119 Md. 403, 86 Atl. 1032; *Thompson v. Poe*, 104 Miss. 586, 61 So. 656; *Michenor v. Kinney*, Wright, 459; *Parks v. Duke*, 2 McCord 380; *Whitley v. Davis' Lessee*, 1 Swan. 333, 335; *Jones v. Logwood*, 1 Wash. (Va.) 56. But see *Adam v. Kerr*, 1 B. & P. 360.

⁵ *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198; *Quincy Horse Ry. Co. v. Omer*, 109 Ill. App. 238; *Jeffery v. Underwood*, 1 Ark. 108; *Comerford v. Cobb*, 2 Fla. 418; *Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Pierce v. Lacy*, 23 Miss. 193; *Groner v. Smith*, 49 Mo. 318; *Lorah v. Nissley*, 156 Pa. St. 329, 27 Atl. 242; *McClamroch, etc., Co. v. Bristow*, 94 S. C. 252, 77 S. E. 923; *Philip v. Stearns*, 20 S. D. 220, 105 N. W. 467; *Whitley v. Davis' Lessee*, 1 Swan, 333; *English v. Helms*, 4 Tex. 228; *Connor v. Autrey*, 18 Tex. 427.

⁶ *Jacksonville, etc., Nav. Co., v. Hooper*, 160 U. S. 514, 40 L. Ed. 515, 16 S. Ct. 379; *G. V. B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633; *Bertrand v. Byrd*, 4 Ark. 195; *Hastings v. Vaughn*, 5 Cal. 315; *Langley v. Owens*, 52 Fla. 302, 42 So. 457; *Stansell v. Corley*, 81 Ga. 453, 8 S. E. 868; *Ankeny v. McMahon*, 4 Ill. 12; *Lorah v. Nissley*, 156 Pa. St. 329, 27 Atl. 242; *Osborn v. Kistler*, 35 Ohio St. 99; *McKain v. Miller*, 1 McMull. (S. C.) 313; *Buckner v. Mackay*, 2 Leigh, 488. But see *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

⁷ *Hacker's Appeal*, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861.

long was a sufficient seal. A few courts, however, still maintain a stricter rule; and while not denying the sufficiency of wafers or of such impressions on paper as are made by notaries' seals, decline to accept as seals a mere written or printed word or device.⁸ In many States statutes have declared that written or printed additions to the paper are sufficient.⁹

Under statutes which allow the use of a scroll or scrawl for a seal, all kinds of informal written or printed substitutes for sealing are permissible; as, for instance, the written or printed word seal.¹⁰

⁸ *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8 (letters [L. S.] held insufficient at common law and therefore in another State where the instrument was executed the law of which was not proved); *McLaughlin v. Randall*, 66 Me. 266 (scroll insufficient); *Manning v. Perkins*, 86 Me. 419, 29 At. 1114 (printed word [seal] insufficient); *Bates v. New York Central R. Co.*, 10 Allen, 251 (facsimile of corporate seal printed on document insufficient. This was held sufficient in *Woodman v. York, etc., R. Co.*, 50 Me. 549); *Bishop v. Globe Co.*, 135 Mass. 132 (printed word [seal] insufficient); *Providence, etc., Co. v. Crahan Engraving Co.*, 24 R. I. 175, 52 Atl. 804 (written scroll containing the word seal, insufficient); *Beardsley v. Knight*, 4 Vt. 471 (written word seal insufficient.)

⁹ *Alabama*, Code (1907), § 3363. An instrument purporting to be under seal has the same effect as if a seal were affixed.

California, Civ. Code, § 193. A scroll or the word seal after the signature is sufficient.

Colorado, Mills Stat. (1912), § 824. A scroll is enough.

Connecticut, Gen. Stat. (1918), § 5742. The word seal or the letters L. S. are sufficient.

Florida, Comp. Laws (1914), § 2484. A scrawl or scroll written or printed is sufficient.

Georgia, Code, § 5. A scrawl or any other mark intended as a seal shall be held as such.

Idaho, Rev. Stat. (1908), §§ 13, 5989. Impression on the paper is enough, or a scroll, or the word seal.

Illinois, Jones & Addington's Stat. (1913), § 2223. A scrawl, affixed by way of a seal, has the same effect as a seal.

Michigan, Comp. Laws (1916), § 11740. A scroll or device used as a seal has the same effect as a seal.

New Jersey, Comp. Stat. (1911), pp. 1540, 3776. A scroll or other device is sufficient.

New Mexico, Comp. Laws (1897), § 3932. A scroll is sufficient.

New York, Gen. Const. Law, § 44. A seal shall consist of a wafer, wax, or other similar adhesive substance or of paper or other similar substance, affixed thereto by mucilage or other adhesive substance, or of the word seal or the letters L. S. opposite the signature.

Oregon, Lord's Oreg. Laws (1910), § 775. Impression, wafer, wax, paper, scroll, or other sign made with a pen, constitutes a seal.

Rhode Island, General Laws (1909), c. 32, § 14. An impression is sufficient.

South Dakota, Comp. Laws (1913), § 2473. Like Rhode Island.

Utah, Comp. Laws (1917), §§ 5726, 7105. A scroll, printed or written, or the word seal is sufficient.

Virginia, Code (1904), §§ 5 (12), 2841. A scroll is sufficient.

West Virginia, Code (1913), § 344. A scroll written or printed is sufficient.

Wisconsin, Stat. (1915), § 2215. A scroll or device as a seal is sufficient.

¹⁰ *Bertrand v. Byrd*, 4 Ark. 195; *Jackson v. Security Mut. L. I. Co.*, 233 Ill. 161, 84 N. E. 198; *Whittington v. Clarke*, 16 Miss. 480; *Buckner v. Mac-*

As long as the question whether an instrument was under seal depended on whether a piece of wax impressed with the obligor's seal was attached, intention played no part in the determination of the question; but it will be observed that the extensions of the common law result in making the intention of the obligor of vital importance, for when almost anything may serve as a seal whether or not it is in fact a seal depends upon whether it was affixed or adopted as such, that is, upon whether it was intended to be a seal.¹¹ If, however, a wafer or something appropriate for a seal was on the paper at the time of execution or was subsequently attached thereto by the signer in the place customary for a seal there is at least *prima facie* proof of the requisite intention.¹²

It was early established that the maker of a deed need not himself attach the seal.¹³ And one seal may serve for several persons. It was formerly thought necessary that each should make an impression upon the seal,¹⁴ but this was ultimately held unnecessary. If,

kay, 2 Leigh, 488; *Lewis v. Overby*, 28 Gratt. 627; *Osborn v. Kistler*, 35 Ohio St. 99.

¹¹ Thus a piece of ribbon attached to parchment for the purpose of keeping the wax of a seal on the parchment was held insufficient, there being no trace of wax having actually been attached. But Cotton, L. J., said: "It is true that if the finger be pressed on the ribbon, that may amount to sealing, but no such inference can be drawn here." *National Provincial Bank v. Jackson*, 33 Ch. D. 1, 11. Such a ribbon was similarly held insufficient in *Duncan v. Duncan*, 1 Watts, 322. Similarly though a scrawl or flourish may be a seal in Pennsylvania, in *Taylor v. Glaser*, 2 S. & R. 502, it was held a flourish was not a seal because put under the signature, and apparently intended merely as part of it.

¹² In *Langley v. Owens*, 52 Fla. 302, 309, 310, 42 So. 457, the court said: "It is not contended that the defendant did not in fact adopt and use the character or device (L. S.) as it appears to the right of his signature in the notes, but that he did not adopt and intend it as a seal. Where there is no dispute as to the character or device used in the execution of a written instrument it is for the court to determine whether the device as used constitutes a seal. See *Beardsley v. Knight*, 4 Vt. 471; *Jacksonville M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

"Under this statute [Acts of 1893, c. 4148], a scrawl or scroll, affixed as a seal, to the signature of the maker of a promissory note is as effectual as a seal, and when such scrawl or scroll, printed or written, appears affixed to the maker's signature in the place usually occupied by the seal it is, in the absence of fraud, sufficient to give it effect as a seal. See *Hudson v. Poindexter*, 42 Miss. 304; *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. 430; *Hacker's Appeal*, 121 Pa. St. 192, 15 Atl. 500, 1 L. R. A. 861."

¹³ Perkins's Profitable Book, § 130, "But it is nothing to charge, whether it be sealed with the seal of the grantor or not, or by a stranger, or by the grantor, if the grantor deliver the writing, &c. as his deed." See also *Ankeny v. McMahon*, 4 Ill. 12; *Line v. Line*, 119 Md. 403, 86 Atl. 1032; *Underwood v. Dollins*, 47 Mo. 259; *Osborn v. Kistler*, 35 Oh. St. 99; *Lorah v. Nissley*, 156 Pa. 329, 27 Atl. 242; *McKain v. Miller*, 1 McMull, 313.

¹⁴ Shepard's Touchstone, 57. "And if there be twenty to seal one deed, and they seal all upon one piece of wax and with one seal, yet if they make distinct and several prints; this is a very sufficient sealing, and the deed is good enough."

therefore, an instrument signed by several persons has seals opposite less than all the signatures, it may, nevertheless, be the sealed instrument of all; and if there is a general recital of sealing, it will be presumed that those who signed without affixing an individual seal adopted any seal which was already upon the instrument;¹⁵ though parol evidence to the contrary is admissible.¹⁶ If the instrument contains no recital or other statement tending to show that all the signers executed it under seal, it has been held that the mere fact that the signature to which no seal is affixed follows a signature which is followed by a seal is no evidence that the subsequent signers adopted the seal of the prior signer;¹⁷ but parol evidence might show such adoption.¹⁸

It has been said that if "the first sign without a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues, as to him, a simple instrument, as it was when he first executed it."¹⁹ It is to be observed, however, that the question is whether the instrument was sealed when it was delivered. If the first signer, therefore, delivered the instrument or authorized its delivery after a seal had to his knowledge been attached by subsequent parties, there seems as much reason to infer an adoption of the seal from recitals in the instrument as if the unsealed signature were the last on the instrument.

A corporation as well as an actual person may adopt as its seal to a document anything which is capable of being adopted as a seal by a natural person, even though the corporation have a special seal which it ordinarily uses.²⁰

It is usual at the close of a deed to state that it has been "signed, sealed and delivered," or that "in witness whereof the maker hereunto sets his hand and seal," or similar words. Such a recital, however, though desirable as evidence of the signer's intent, is not essential to the validity of the instrument as a covenant. Under the

¹⁵ *Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Davis v. Burton*, 4 Ill. 41, 36 Am. Dec. 511; *McLean v. Wilson*, 4 Ill. 50; *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213; *Tasker v. Bartlett*, 5 Cush. 359; *Lunsford v. LaMotte Lead Co.* 54 Mo. 426; *Burnett v. McCluey*, 78 Mo. 676, 688; *Pequawket Bridge v. Mathes*, 7 N. H. 230, 26 Am. Dec. 737; *Bowman v. Robb*, 6 Pa. 302. But see *contra* *Stabler v. Cowman*, 7 G. & J. 284; *State v. Humbird*, 54 Md. 327, which held general recitals of sealing no evidence of adoption.

¹⁶ *Yarborough v. Monday*, 3 Dev. 420; *Hollis v. Pond*, 7 Humph. 222; *Lambden v. Sharp*, 9 Humph. 224.

¹⁷ *Cooch v. Goodman*, 2 Q. B. 580, 598; *Hess's Estate*, 150 Pa. 346, 24 Atl. 676. But see apparently contrary statements in *Eames v. Preston*, 20 Ill. 389; *Muckleroy v. Bethany*, 23 Tex. 163.

¹⁸ *Ball v. Dunsterville*, 4 T. R. 313; and see cases cited in the preceding two notes.

¹⁹ *Eames v. Preston*, 20 Ill. 389; *Rankin v. Roler*, 8 Gratt. 63.

²⁰ *G. V. B. Mining Co. v. First Nat. Bank*, 95 Fed. 23, 33, 36 C. C. A. 633, and cases cited.

earliest common-law view an instrument necessarily showed whether it was sealed with the obligor's seal, and if such an instrument so sealed were outstanding, the obligor was liable. And even after some actual delivery by the obligor had become necessary, and also after it may be supposed to have become necessary that the seal should be actually affixed or adopted by the obligor, it was still true in the main that it could be determined on inspection whether a document was sealed or not without reference to any recitals. Such recitals accordingly were held unnecessary.²¹

In Virginia and a few other States, however, a different rule prevails, and whether the seal attached to the instrument is one which would have been regarded as such by the early common law or not, a recital that the instrument is sealed must be made.²²

Under the extension of the common-law definition of what constitutes a seal,²³ a distinction is taken in some jurisdictions. It is held that to give a scroll or similar modern substitute for a seal the effect of one, requires a recital, but that a real or unmistakable seal is effectual without a recital.²⁴ But no such requirement is

²¹ Anonymous, 1 Dyer, 19 a, pl. 113; *Goddard's Case*, 2 Coke, 4 b. 5 a; *Bedow's Case*, 1 Leon. 25; *Peters v. Field*, Hetly, 75; *Thompson v. Butcher*, 3 Bulstr. 300, 302 (but see *Clement v. Gunhouse*, 5 Esp. 83); *Burton v. LeRoy*, 5 Sawy. 510; *Jeffery v. Underwood*, 1 Ark. 108; *Bertrand v. Byrd*, 4 Ark. 195; *Cummins v. Woodruff*, 5 Ark. 116; *Conine v. Junction, etc., R., Co.*, 3 Houst. 288; *Eames v. Preston*, 20 Ill. 389; *Jackson v. Security Mutual Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198; *Hubbard v. Beckwith*, 1 Bibb., 492; *Wing v. Chase*, 35 Me. 260; *Trasher v. Everhart*, 3 G. & J. 234, 246; *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 428; *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650; *Stioknoth's Estate*, 7 Nev. 223, 234; *Ingram v. Hall*, 1 Hayw. 193, 209; *Osborn v. Kistler*, 35 Ohio St. 99; *Osborne v. Hubbard*, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833; *Taylor v. Glaser*, 2 S. & R. 502; *Frevall v. Fitch*, 5 Whart. 325, 34 Ann. Dec. 558; *Biery v. Haines*, 5 Whart. 563; *Hopkins v. Cumberland R. Co.*, 3 W & S. 410; *Lorah v. Nissley*, 156 Pa. 329, 27 Atl. 242; *Relph v. Gist*, 4 McCord, 267; *McKain v. Miller*, 1 McMull. 313; *Scruggs v. Brackin*, 4 Yerg. 528. See also *McRaven v. McGuire*, 17 Miss. 34; *Hudson v. Poindexter*, 42 Miss. 304.

²² *Bradley Salt Co. v. Norfolk Importing Co.*, 95 Va. 461, 28 S. E. 567. Also *Lee v. Adkins*, Minor, 187; *Carter v. Penn*, 4 Ala. 140; *Moore v. Leseur*, 18 Ala. 606; *Blackwell v. Hamilton*, 47 Ala. 470; *Breitling v. Marx*, 123 Ala. 222, 26 So. 203; *McDonald v. Bear River, etc., Mining Co.*, 13 Cal. 220; *Echols v. Phillips*, 112 Ga. 700, 37 S. E. 977; *Barnes v. Walker*, 115 Ga. 108, 41 S. E. 243; *Bohannon v. Hough*, 1 Miss. 461 (but see *McRaven v. McGuire*, 17 Miss. 34); *Austin's Adm. v. Whitlock's Ex'rs.* 1 Munf. 487, 4 Am. Dec. 550; *Keller's Adm'r v. McHuffman*, 15 W. Va. 64, 85. See also *Buckingham v. Orr*, 6 Col. 587.

²³ See *supra*, § 207.

²⁴ *Alt v. Stoker*, 127 Mo. 466, 30 S. W. 132, and cases cited; *Winter v. Kansas City Ry. Co.*, 160 Mo. 159, 61 S. W. 606; *Newbold v. Lamb*, 2 South. (N. J.) 449; *Corlies v. Van Note*, 1 Harr. (N. J.) 324; *Flemming v. Powell*, 2 Tex. 225 (compare *English v. Helms*, 4 Tex. 228; *Muckelroy v. Bethany*, 23 Tex. 163). See also *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560; *Merritt v. Cornell*, 1 E. D. Smith, 335; *Osborne v. Hubbard*, 20 Oreg. 318, 25 Pac. 1021. In Missouri and Texas seals are now abolished altogether. See *infra*, § 218. In some jurisdictions at least the mere presence

generally made.²⁵ It seems, therefore, that in most jurisdictions whether an instrument is under seal or not must frequently be open to determination by extrinsic parol evidence of the intention with which some scroll or dash was affixed to the signature of the maker.²⁶ Though if statements or recitals are made in an instrument to which is affixed something capable of being a seal if intended as such, that it is sealed, such statements are doubtless evidence and perhaps conclusive evidence of the obligor's intent.²⁷

of a seal is not sufficient evidence that the instrument is sealed. There must be either a recital or extrinsic evidence of sealing by the obligor. *In re Pirie*, 198 N. Y. 209, 91 N. E. 587; *Taylor v. Glaser*, 2 Serg. & R. 502; *Smith v. Henning*, 10 W. Va. 596, 631, cf. *Jackson v. Security L. Ins. Co.*, 233 Ill. 161, 84 N. E. 198.

²⁵ See cases cited, *supra*, p. 610 n.

²⁶ It is indeed said in *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 519, 40 L. Ed. 515, 16 S. Ct. 379, "Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper" citing *Hacker's Appeal*, 121 Penn. St. 192, 15 Atl. 500, 1 L. R. A. 861; *Pillow v. Roberts*, 13 How. 472, 474, 14 L. Ed. 228. But it is hard to see, if recitals are unnecessary, and anything may serve for a seal which is so intended, how "the intention of the executant, as shown by the paper" can be decisive. *Non constat* that any intention appears from the paper. In *Jeffery v. Underwood*, 1 Ark. 108, 111, the court said: "The scrawl must appear on the face of the instrument; the proof that it was placed there by way of seal may be by evidence *dehors* the instrument." In *National Provincial Bank v. Jackson*, 33 Ch. D. 1, 11, the court referred as important, to evidence of an attesting witness as to whether the finger of the maker was pressed upon the ribbon attached to the document, or anything of the sort. And see cases at the end of the preceding note.

²⁷ In *Metropolitan Life Ins. Co. v. McCoy*, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708, a penal bond was signed which recited that it was sealed, but which in fact was not sealed at the time when one of the obligors signed it, seals being afterwards affixed by the other obligor. It was held that the first obligor was estopped to deny the validity of the sealing. In *State v. Humbird*, 54 Md. 327, and *Taylor v. Glaser*, 2 S. & R. 502, it was held that a recital of sealing does not estop the maker of a penal bond delivered without seals from denying that it is sealed. See also *Hudson v. Webber*, 104 Me. 429, 72 Atl. 184. In *Barnet v. Abbot*, 53 Vt. 120, it was held that a recital in a bond that it was sealed is evidence that it was sealed when delivered but not conclusive proof. See further as to the general conclusiveness of recitals, *supra*, § 115. In *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560, the court said: "Such words in the *testimonium* clause as 'witness my hand and seal,' or 'sealed with my seal,' would establish that the scroll or device was used as a seal. . . . It would be difficult to conceive how the party could express that the device was intended for a seal more clearly than by the word 'seal' placed within and made a part of it." To the same effect is *Osborne v. Hubbard*, 20 Oreg. 318, 25 Pac. 1021. In *Whittington v. Clarke*, 16 Miss. 480, 485, Thatcher, J., said, "Whenever it is manifest that a scroll is intended to be used 'by way of seal,' it must have that effect, whether it appears from the body of the instrument, or from the scroll itself."

SECTION II

DELIVERY

WHYDDON'S CASE

Cro. Eliz. 520. 1596.

ANNUITY. The defendant saith, that he delivered the deed of annuity to the plaintiff as an escrow, to be his deed upon a certain condition to be performed, otherwise not: and that the condition was not yet performed. The plaintiff demurred; and, without argument, adjudged for the plaintiff: for the delivery of a deed cannot be averred to be to the party himself as an escrow. *Vide* 19 Hen. 8, pl. 8; 29 Hen. 8; and *Morice's Case*, Dyer, 23 b, 25 a, in margin.¹

¹ *Whitney v. Dewey*, 10 Idaho 633; *Ryan v. Cooke*, 172 Ill. 302; *City Bank v. Anderson*, 189 Ky. 487; *Reed v. Reed*, 117 Me. 281; *Braman v. Bingham*, 26 N. Y. 483; *Hamlin v. Hamlin*, 192 N. Y. 164; *Weisenberger v. Huebner*, 264 Pa. 316; *Gaffney v. Stowers*, 73 W. Va. 420; *Williams v. Green*, Cro. El. 884; s. c. Moore 642; *Thoroughgood's Case*, 9 Co. 136 b; *Bushell v. Pasmore*, 6 Mod. 217, 218, accord.

Contra. Lee v. Richmond, 90 Iowa 695.

Compare *Stanley v. White*, 160 Ill. 605; *Sample v. Greathard*, 281 Ill. 79; *Mitchell v. Clem*, 295 Ill. 150; *Troupe v. Hunter*, 133 N. E. (Ill.) 56; *Bremyer v. School Ass'n*, 86 Kan. 644; *Fairbanks v. Metcalf*, 8 Mass. 230; *Blewitt v. Boorum*, 142 N. Y. 357; *Gaylord v. Gaylord*, 150 N. C. 222; *Whitaker v. Lane*, 128 Va. 317; *Curry v. Colburn*, 99 Wis. 319; *Zoerb v. Paetz*, 137 Wis. 59; *Hawksland v. Gatchel*, Cro. El. 835; *Murray v. Stair*, 2 B. & C. 82; *Hudson v. Revett*, 5 Bing. 368, 388.

Authorities are collected in 16 L. R. A. N. S. 941 note; 5 Minn. L. Rev. 287; Williston, Contracts. § 212.

In *London Freehold Co. v. Baron Suffield*, [1897] 2 Ch. (C. A.) 608, one Wynne was solicitor of the plaintiff Company and was also one of four trustees under a settlement. A mortgage by the plaintiff Company to the trustees was signed and sealed and placed in the hands of Wynne. The Company urged that the delivery was in escrow, but the court found otherwise. In disposing of this point the court said, p. 621: "We are not prepared to go so far as to say that, as Wynne was himself one of the mortgagees and a party to the deed, it could not in point of law be an escrow in his hands. Counsel for the defendants contended that the mere fact that Wynne was himself one of the mortgagees was fatal to the deed being an escrow. They contended that to be an escrow the deed must be delivered to some person not a party taking under it; in short, to a stranger. In support of this contention reliance was placed on Co. Litt. 36 a; Sheppard's Touchstone, 7th ed. pp. 58, 59; and *Whyddon's Case*, Cro. Eliz. 520. No doubt the language used in the authorities referred to and reproduced in other works on real property and conveyancing is in favour of this contention. But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the Court to decide that where there are several grantees and one of them is also solicitor of the grantor and of the other grantees, and the deed is delivered to him, evidence is not admissible to shew the character in which and the terms upon which the deed was so delivered. To exclude such evidence appears to us unreasonable; and we do not think we are compelled by author-

Co. Lit. 36 a. If a man deliver a writing sealed, to the party to whom it is made, as an escrow to be his deed upon certain conditions, &c., this is an absolute delivery of the deed, being made to the party himself, for the delivery is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is only requisite, and then when the words are contrary to the act which is the delivery, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur*. And hereof though there hath been variety of opinions, yet is the law now settled agreeable to judgments in former times, and so was it resolved by the whole Court of Common Pleas. But it may be delivered to a stranger, as an escrow, &c., because the bare act of delivery to him without words worketh nothing. And this is the ancient diversity in our books, the record whereof I have seen agreeable with the reason of our old books. And as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery, as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Go and take up the said writing, it is sufficient for you, or it will serve the turn: or, Take it as my deed, or the like words, it is a sufficient delivery.

SHEP. TOUCH., 58, 59. The delivery of a deed as an escrow is said to be where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made. — The words therefore that are used in the delivery must be after this manner: I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you £20 for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this as an escrow to you, to keep until such a day, &c. upon condition that if before that day he to whom the escrow is made shall pay to me £10, or give to me

ity to exclude it. We hold such evidence to be admissible, and in so doing we believe we are acting in accordance with modern authorities, beginning with *Murray v. Earl of Stair*, 2 B. & C. 82, and ending with *Watkins v. Nash*, L. R. 20 Eq. 262. Upon the evidence, however, to which we have already referred, we come to the conclusion that the mortgage was executed as a complete deed."

Cases on conditional delivery to agent of grantee. *Ashford v. Prewitt*, 102 Ala. 264; *Alabama Coke & Coal Co. v. Gulf Coke & Coal Co.*, 165 Ala. 304; *Roach v. A. D. Malone Co.*, 135 Ark. 69; *Bond v. Wilson*, 129 N. C. 325; *Cincinnati Rd. Co. v. Iliff*, 13 Ohio St. 235; *Watkins v. Nash*, L. R. 20 Eq. 262.

a horse, or enfeoff me of the manor of Dale, or perform any other condition; that then you shall deliver this escrow to him as my deed. For if when I shall deliver the deed to the stranger, I shall use these or the like words; I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London; in these cases the deed doth take effect presently, and the party is not bound to perform any of the conditions.¹ So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself to whom it is made as an escrow upon certain conditions, &c. in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions; for, *In traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur*. But in the first cases before, where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it, and laid it by me, and not delivered it at all; and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good. But when the conditions are performed, and the deed is delivered over,² then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect. then, if the party that doth make it be not at the time of making thereof disabled to make it. He therefore, that is trusted with the keeping and delivering of such a writing, ought not to deliver it before the conditions be performed; and when the conditions be performed, he ought not to keep it, but to deliver it to the party. For it may be made a question, whether the deed be perfect, before he hath delivered it over to the party according to the authority given him. Howbeit it seems the delivery is good, for it is said in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the life-time of the parties; *et postea consummata existens* by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery. And therefore if an infant, or woman covert, deliver a deed as an escrow to a stranger, and before the conditions are performed, the infant is become of full age, or the woman

¹ But see *State Bank v. Evans*, 3 Green (N. J. L.) 155.

² See *Bradbury v. Davenport*, 120 Cal. 152; *Hughes v. Thistlewood*, 40 Kan. 232; *Regan v. Howe*, 121 Mass. 424; *Francis v. Francis*, 143 Mich. 300; *Craddock v. Barnes*, 142 N. C. 89; *Farley v. Palmer*, 20 Ohio St. 223; *Prutsmann v. Baker*, 30 Wis. 644, 649. Compare *Tombler v. Sumpter*, 97 Ark. 480; *Guild v. Althouse*, 71 Kan. 604; *Knopf v. Hansen*, 37 Minn. 215; *Hooper v. Ramsbottom*, 6 Taunt. 12.

is become sole, yet the deed in these cases is not become good. And yet if a disseisee make a deed purporting a lease for years, and deliver it to a stranger out of the land as an escrow, and bid him enter into the land, and deliver it as his deed, and he do so, this is a good deed, and a good lease, so that to some purposes it hath relation to the time of the first delivery, and to some purposes not.

CHAUDOIR v. WITT AND OTHERS

170 Wis. 556, 562. 1920.

WINSLOW, C. J.¹ The reargument has convinced us that we were in error in reversing the judgment in this case, and the former opinion must be considered as withdrawn and the judgment of reversal set aside.

The trial court's findings were that both deeds were delivered with the intention of conveying the property, but this court held that these findings were contrary to the clear preponderance of the evidence and that the evidence demonstrated that the deeds were understood by all parties to be testamentary documents only and were never delivered with intent that they should take effect as deeds. We now think that this was an erroneous holding. The only direct testimony as to what was done with the deeds after their execution was the testimony of Frank Suelflow, the real-estate man, the grantee named in the first deed. He testified directly that Mr. Witt executed the first deed running to him (Suelflow) and gave it to him, and that he then had another deed made out signed and executed by himself and wife, and that he (Suelflow) gave both deeds to Mrs. Witt for the purpose of conveying the property to her. No witness details the conversation which occurred on either occasion, but Suelflow says, and in this testimony is sustained by Damkoehler, that Witt wanted to deed his property to his wife because he was sick and he might die, and in case he died the property would be assigned to his wife, and that the deeds were not to be recorded until after his death. The appellant's proposition is in brief that this evidence last referred to overcomes the inference of delivery naturally to be drawn from the manual tradition of the deeds.

Mature consideration convinces us to the contrary. The conclusion rather is that the deeds were intended to be legally effective at once (in the sense of not being subject to revocation), but were expected not to pass the title until the happening of an outside event, namely, the death of the grantor; in other words, the grants were upon condition.

¹ The proceedings prior to the opinion on rehearing are omitted.

No court has more positively or consistently held that there cannot be a conditional delivery of a deed to the grantee himself than this court. In *Hinchliff v. Hinman*, 18 Wis. 130, it was held that if a deed is executed and delivered with intent to pass the estate to the grantee it must so operate though both parties supposed that it would not take effect until recorded and also supposed that while unrecorded the grantor might control or revoke it. In *Lowber v. Connit*, 36 Wis. 176, it was said that if a grantor of land does not intend his deed to take effect until some condition is performed he must keep it to himself or leave it in escrow with a stranger and not deliver it to the grantee. In *Prutsman v. Baker*, 30 Wis. 644, the subject of conditional delivery of a deed was discussed by Chief Justice Dixon, who said: "A conditional delivery is and can *only* be made by placing the deed in the *hands of a third person*, to be kept by him until the performance of some condition or conditions by the grantee or some one else, or until the happening of some event" when it is to be delivered by the depositary to the grantee. These cases were followed in *Rogers v. Rogers*, 53 Wis. 36, 10 N. W. 2, in which it was held that if a grantor did not wish his deed to go into effect at once he should keep it himself or place it in the hands of a stranger and not deliver it to the grantee. And these cases are in accord with the general current of authority to the effect that a delivery in escrow or upon conditions cannot be made to the grantee himself, and that such a delivery at once becomes absolute and the supposed conditions are of no effect. 18 Corp. Jur. p. 211; 16 Cyc. 571; 1 Warvelle, Vendors, p. 517; *Worrall v. Munn*, 5 N. Y. 229; *Braman v. Bingham*, 26 N. Y. 483; *Wallace v. Berdell*, 97 N. Y. 13; *Blewitt v. Boorem*, 142 N. Y. 357, 37 N. E. 119; *Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805; *Hovey v. Hovey*, 170 N. Y. Supp. 822, affirmed 183 App. Div. 184; *Beers v. Beers*, 22 Mich. 42; *Wipfler v. Wipfler*, 153 Mich. 18, 116 N. W. 544; *Fairbanks v. Metcalf*, 8 Mass. 230; *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212; *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68.

The reason of the rule is quite obvious. If it were possible to prove in every case that parol conditions were attached to the formal delivery of a deed there would be no safety in accepting a deed. Titles would be open to attack at all times, and the practical result would be to defeat the solemn provisions of a duly executed and formally delivered deed by parol testimony. There were circumstances in the present case tending quite persuasively to show that both Mr. and Mrs. Witt supposed that the title remained in Mr. Witt during his life, but of course their erroneous impression as to the legal effect of the transaction could not control that effect. If the law is, as we now hold, that such conditional delivery made to the grantee at once becomes an absolute delivery freed of the supposed conditions, then the controversy here is closed, because

the title at once passed in spite of the idea of the parties that it was not to pass until after Mr. Witt's death.

There are authorities justifying more or less satisfactorily our former holding, some of which will be found cited in the former opinion. It will be found, however, on close examination of most of these cases that they are cases where, although the grantee had manual possession of the deed, it affirmatively appeared that the grantor retained control over it. Conceding in the present case that there is some testimony tending to show that the grantor expected to retain control over the deeds, it certainly cannot be said to be sufficient to overturn the findings of the trial court that the deeds were delivered with intent to convey the property. These findings are founded on sufficient affirmative evidence, are not against the clear preponderance of the evidence, and hence must stand.

By the Court.

Judgment affirmed.

SIEBECKER and VINJE, JJ., dissent.

A motion by appellant for a rehearing and for a modification of the mandate as to costs, made December 31, 1919, was denied, with \$25 costs, on February 10, 1920.¹

DOE d. GARNONS v. KNIGHT

5 B. & C. 671. 1826.

THIS was an ejectment brought to recover possession of certain messuages and lands in the County of Flint. The lessor of the plaintiff claimed the property as mortgagee under a deed purporting to be executed by W. Wynne, deceased. At the trial before *Garrow*, B., at the Summer Assizes for the County of Stafford, 1825, the principal question turned on the validity of that deed; and the following appeared to be the facts of the case: Wynne was an attorney residing at Mold in Flintshire, and had acted in that character for Garnons, the lessor of the plaintiff, who resided at a distance of about three miles from Mold. Wynne's sister and niece lived in a house adjoining to his own at Mold. On the 12th of April, 1820, about six o'clock in the evening, Wynne called at his sister's house, his niece then being the only person at home, and asked her to witness or sign some parchment. He produced the parchment, placed it on the table, signed his name, and then said, "I deliver this as my act and deed," putting his finger at the same time on the seal; the niece signed her name, and he took it away with him. The deed remained

¹ *Mowry v. Heney*, 86 Cal. 471; *Hammond v. McCollough*, 159 Cal. 639; *Bias v. Reed*, 169 Cal. 33; *Baker v. Baker*, 159 Ill. 394; *Wipler v. Wipler*, 153 Mich. 18, *accord*.

But compare *Kenney v. Parks*, 125 Cal. 146; *Cox v. Schnerr*, 172 Cal. 371; *Elliott v. Murray*, 225 Ill. 107; *Tewksbury v. Tewksbury*, 222 Mass. 595; *Smith v. Thayer*, 125 N. E. (Mass.) 171.

on the table until he took it away. He did not mention to his niece the contents of the deed, or the name of Mr. Garnons. The niece had no authority from Mr. Garnons to receive anything for him. It was proved by Miss Elizabeth Wynne, the sister of Wynne, that in April, 1820 (but whether before or after the execution of the deed as above mentioned did not distinctly appear), he brought her a brown paper parcel, and said, "Here, Bess, keep this: it belongs to Mr. Garnons." Nothing further passed at this time; but a few days after he came again, and asked for the parcel, and she gave it to him: he returned it back to her again on the 14th, 15th, or 16th of April, saying, "Here, put this by." When she received it the second time, it was less in bulk than before. Wynne died in August, 1820. After his funeral, she delivered this parcel to one Barker in the same state in which she received it from her brother. Barker, who was an intimate friend of Wynne, stated, that the latter in July, 1814, sent for him, and told him that he had received upwards of £26,000 upon Mr. Garnons' account; and after taking credit for sums he had paid, and placed out for Mr. Garnons, he was still indebted to him in more than £13,000. He then asked the witness, if he, as his (Wynne's) friend, would see Mr. Garnons to explain the circumstances. The witness consented, and Wynne then made a statement of his property, by which it appeared that after payment of his debts, including the £13,000, he would have a surplus for himself and family of £8,000 at the least. He desired the witness to tell Garnons that, although he could not pay him at that time, he would *take care to make him perfectly secure* for all the moneys due from him. Upon this being communicated to Garnons he desired Barker to assure Wynne, that he would not then distress him, or expose his circumstances, but he expected that he would provide him securities for the money he, Wynne, owed him. This was communicated to Wynne, who expressed great gratitude to Garnons, and said he would take care to make him perfectly secure. After the funeral of Wynne, his will was produced, and with it was a paper in his own handwriting, containing a statement of his property, and a list of various debts secured by mortgage or bond, and among others, under the title "*mortgage*," there was stated to be a debt to Mr. Garnons for £10,000. Miss Wynne soon after delivered to the witness, Barker, a brown paper parcel sealed, but not directed. Upon this being opened, there was enclosed in it another white paper parcel, directed, in the handwriting of Wynne, "Richard Garnons, Esq." Within it was a mortgage deed (the same that was witnessed by Wynne's niece, as before stated), from Wynne to Garnons for £10,000. There was also within the white parcel, a paper folded in the form of a letter directed in the handwriting of Wynne to Mr. Garnons. That contained a statement of the account between Wynne and Garnons, and £10,000; part of the balance due from Wynne to Garnons, was stated to be secured upon Wynne's property. The

mortgage deed found in the parcel was then delivered to Garnons. It was a mortgage of all Wynne's real estates. It was contended on the part of the defendant that nothing passed by the deed, inasmuch as there had been no sufficient delivery of it to the mortgagee, or to any person on his behalf, to make it valid; and, secondly, because it was fraudulent and void against the creditors of the grantor under the Statute 13 Eliz. c. 5. The learned judge overruled the objections, and the defendant then proved that Mr. Wynne, in May, 1820, had delivered to him a bond and mortgage of his real estates, to secure money due from Wynne to him; and that by his will he devised all his estates to the defendant, Knight, in trust to sell and pay his debts. It was further proved, that about the 5th of April a skin of parchment with a £12 stamp was prepared by Wynne's order, and for a few days he remained in his private room, with the door shut. A clerk entered the room and found him writing upon a parchment: he afterwards locked the door. There was no draft of the mortgage in the office, and he never mentioned it. The whole of the deed was in Wynne's own handwriting. He had three clerks, and deeds were in the usual course of business executed in the office, and witnessed by himself and his clerks. The learned judge told the jury, that the first question for their consideration was, whether the mortgage to the lessor of the plaintiff was duly executed by Wynne the deceased; but that if they thought it was originally well executed, the question for their consideration would be, whether the delivery to Mrs. Elizabeth Wynne was a good delivery; and he told them he was of opinion, that if, after it was formally executed, Mr. Wynne had delivered it to a friend of Mr. Garnons, or to his banker for his use, such delivery would have been sufficient to vest in Mr. Garnons the interest intended to be conveyed to him under it; and the question for them to decide was, whether the delivery to Miss Wynne was, under all the circumstances of the case, a departing with the possession of the deed, and of the power and control over it, for the benefit of Mr. Garnons, and to be delivered to him either in Mr. Wynne's lifetime or after his death; or whether it was delivered to Miss Wynne merely for safe custody as the depository, and subject to his future control and disposition. If they were of opinion that it was delivered merely for the latter purpose, they should find for the defendant, otherwise for the plaintiff. A verdict having been found for the plaintiff, *Campbell* in last Michaelmas Term obtained a rule *nisi* for a new trial.

BAYLEY, J., now delivered the judgment of the court.

There were two points in this case. One, whether there was an effectual delivery of a mortgage deed, under which the lessor of the plaintiff claimed, so as to make the mortgage operate. The other, whether such mortgage was or was not void against creditors or a subsequent mortgagee. Upon the first point the facts were shortly

these. In July, 1814, Mr. Wynne, an attorney, who was seised in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (Wynne) had misapplied above £10,000 of his (Garnons') money. Garnons answered, he relied and expected that Wynne would provide him securities for his money; and Wynne said he would make him perfectly secure, and he should be no loser. On the 12th of April, 1820, Wynne went to his sister's, who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece, and used the words "I deliver this as my act and deed." The niece, by his desire, attested the execution, and then Mr. Wynne took it away. The niece knew not what the deed was, nor was Mr. Garnons' name mentioned. In the same month of April he delivered a brown paper parcel to his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons." He came for it again in a few days, and she gave it to him; and he returned it on the 14th, 15th, or 16th of April, saying, "Here, put this by." It was then less in bulk than before, and contained the mortgage in question. Mr. Wynne died the 10th of August following, and after his death the parcel was opened, and the mortgage found. Mr. Garnons knew nothing of the mortgage until after it was so found. My Brother Garrow, who tried the cause, left two questions to the jury: one, whether the mortgage was duly executed; the other, whether the delivery to the sister was a good delivery; and he explained to them, that if the delivery was a departing with the possession, and of the power and control over the deed for the benefit of Mr. Garnons, in order that it might be delivered to him either in Mr. Wynne's lifetime, or after his death, the delivery would be good: but if it was delivered to the sister for safe custody only for Mr. Wynne, and to be subject to his future control and disposition, it was not a good delivery, and they ought to find for the defendant. The jury found for the plaintiff. Their opinion, therefore, was, that Mr. Wynne parted with the possession and all power and control over the deed, and that the sister held it for Mr. Garnons, free from the control and disposition of the brother. It was urged upon the argument, that there was no evidence to warrant this finding, and that the conclusion which the jury drew had no premises upon which it can be supported. Is this objection, however, valid? Why did Mr. Wynne part with the possession to his sister, except to put it out of his own control? Why did he say when he delivered the first parcel, "It belongs to Mr. Garnons," if he did not mean her to understand, that it was to be held for Mr. Garnons' use? And though the sister did return it to her brother when he asked for it, would she not have been justified had she refused? Might she not have said, "You told me it belonged to Mr. Garnons, and I will part with it to no one but with his concurrence." The finding, therefore,

of the jury, if this be a material point, appears to me well warranted by the evidence, and then there will be two questions upon the first point: one, whether when a deed is duly signed and sealed, and formally delivered with apt words of delivery, but is retained by the party executing it, that retention will obstruct the operation of the deed; the other, whether if delivery from such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the person who is to be benefited by it, until after the death of the party by whom it was executed. Upon the first question, whether a deed will operate as a deed though it is never parted with by the person who executed it, there are many authorities to show that it will. In *Barlow v. Heneage*, Prec. Cha. 211, George Heneage executed a deed purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, and gave bond to the same trustees conditioned to pay to them £1,000 at a certain day, in trust for his daughters; but he kept both deed and bond in his own power, and received the profits of the estate till he died: he noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly. It was urged, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only. Lord Keeper Wright said, *these were the father's deeds*, and he could not derogate from them; and the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only; but that decree was, that interest should be paid upon the bond from the time when the condition made the money payable. In *Clavering v. Clavering* (Prec. Cha. 235; 2 Vern. 473; 1 Bro. Parl. Cas. 122), Sir James Clavering settled an estate upon one son in 1684, and in 1690 made a settlement of the same estate upon another son: he never delivered out or published the settlement of 1684, but had it in his own power, and it was found after his death amongst his waste papers. See 2 Vern. 474, 475. A bill was filed under the settlement of 1690, for relief against the settlement of 1684; but Lord Keeper Wright held, the relief could not be granted, and observed, that though the settlement of 1684 was always in the custody or power of Sir James, that did not give him a power to resume the estate, and he dismissed the bill. In *Lady Hudson's Case*, cited by Lord Keeper Wright, a father, being displeased with his son, executed a deed giving his wife £100 per annum in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, cancelled it. The wife found the deed after his death, and on a trial at law, the deed being

proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord Somers dismissed the bill. In *Naldred v. Gilham*, 1 Pr. Wms. 577, Mrs. Naldred in 1707 executed a deed, by which she covenanted to stand seised to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement; a copy of this deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish this copy, and to have the second settlement delivered up; and Sir Joseph Jekyl determined, with great clearness, for the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. It is true, Lord Chancellor Parker reversed this decree; but it was not on the ground that the deed was not well executed, or that it was not binding because Mrs. Naldred had kept it in her possession, but because it was plain that she intended to keep *the estate* in her own power; that she designed that there should have been *a power of revocation in the settlement*; that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon, by the deed's being made an *absolute conveyance*, which was unreasonable, when it ought to have had a power of revocation, and because the plaintiff, if he had any title, had a title *at law*, and had, therefore, no business in a court of equity. Lord Parker's decision, therefore, is consistent with the position that a deed, *in general*, may be valid, though it remains under the control of the party who executes it, not at variance with it; and so it is clearly considered in *Boughton v. Boughton*, 1 Atkyns, 625. In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. Lord Hardwicke considered it as valid, and acted upon it; and he distinguished it from *Naldred v. Gilham*, which he said was not applicable to every case, but depended upon particular circumstances; and he described Lord Macclesfield as having stated, as the ground of his decree, that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking (or rather of reserving a power to revoke). Upon these authorities, it seems to me, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on *Doe v. Roberts*, 2 Barn. & A. 367, because there the brother who executed the deed, though he retained the title deeds, parted with the deed which he executed.

But if this point were doubtful, can there be any question but

that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit (11 East, 623, *per* Lord Ellenborough); and there is the strongest ground here for presuming Mr. Garnons' assent, because of his declaration that he relied and expected Mr. Wynne would provide him security for his money, and Wynne had given an answer importing that he would. Sheppard, who is particularly strict in requiring that the deed should pass from the possession of the grantor (and more strict than the cases I have stated imply to be necessary), lays it down that delivery to the grantee will be sufficient, or delivery to anyone he has authorized to receive it, or delivery to a stranger *for his use and on his behalf* (Shep. 57). And 2 Roll. Abr. (K.) 24, pl. 7; *Taw v. Bury*, Dyer, 167 b; 1 Anders. 4; and *Alford v. Lea*, 2 Leon. 111; Cro. Eliz. 54; and 3 Co. 27, are clear authorities, that, on a delivery to a stranger for the use and on the behalf of the grantee, the deed will operate *instantly*, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this: "If a man make an obligation to I., and deliver it to B., if I. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant (3 H. 6, 27)." The point is put *arguendo* by Paston, Sergt., in 3 H. 6, who adds, "for a servant may do what is for his master's advantage, what is to his disadvantage not." In *Taw v. Bury* an executor sued upon a bond: the defendant pleaded, that he caused the bond to be written and sealed, and delivered it to Calmady to deliver to the testator as defendant's deed; that Calmady offered to deliver it to testator as defendant's deed, and the testator refused to accept it as such; wherefore Calmady left it with testator as a schedule, and not as defendant's deed, and so *non est factum*. On demurrer on this and another ground, Sir Henry Brown and Dyer, Justices, held that, first by the delivery of it to Calmady, without speaking of it as the defendant's deed, the deed was good, and was in law the deed of defendant before any delivery over to the testator, and then testator's refusal could not undo it as defendant's deed from the beginning, and they gave judgment for the plaintiff, very much against the opinion of the Chief Justice, Sir Anthony Brown; but others of the King's Bench, says Dyer, agreed to that judgment. It was afterwards reversed, however, for a discontinuance in the pleadings. Sir A. Brown's doubt might possibly be grounded on this, that the delivery to Calmady was conditional, if the testator would accept it; and if so, it would not invalidate the position, which alone is material here, that an unconditional delivery to a stranger for the benefit of the grantee will inure immediately to the benefit of the grantee, and will

make the deed a perfect deed, without any concurrence by the grantee. And this is further proved by *Alford v. Lea*, 2 Leon. 110; Cro. Eliz. 54. That was debt upon an arbitration bond; the award directed, that before the feast of Saint Peter both parties should release to each other all actions. Defendant executed a release on the eve of the feast, and delivered it to Prim to the use of the plaintiff, but the plaintiff did not know of it until after the feast, and then he disagreed to it, and whether this was a performance of the condition was the question. It was urged that it was not, for the release took no effect till agreement of the releasee. It was answered, it was immediately a release, and defendant could not plead *non est factum*, or countermand it, and plaintiff might agree to it when he pleased. And it was adjudged to be a good performance of the condition, no place being appointed for delivering it, and the defendant might not be able to find the plaintiff, and they relied on *Taw's Case*. This, therefore, was a confirmation, at a distance of twenty-eight years, of *Taw v. Bury*; and at a still later period (33 Eliz.), it was again confirmed in the great case of *Butler v. Baker*, 3 Co. 26 b. Lord Coke explains this point very satisfactorily. "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently. But if C. offer it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force (but, perhaps, in such case, A. in an action brought on this obligation cannot plead *non est factum*, because it was once his deed); and therewith agrees Hil. 1 Eliz., *Tawe's Case*, s. p. Bro. Ab. Donee, pl. 29; 8 Vin. 488. The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested, and such disagreement need not be in a court of record. Note, reader, by this resolution you will not be led into error by certain opinions delivered by the way and without premeditation, in 7 Ed. 4, 7, &c., and other books *obiter*." Upon these authorities we are of opinion that the delivery of this deed by Wynne, and putting it into the possession of his sister, made it a good and valid deed at least from the time it was put into the sister's possession.

The remaining question then is this, whether this deed is void as against creditors under the 13 Eliz. c. 5, or as against defendant as a purchaser under 27 Eliz. c. 4? As to creditors, there was no proof of outstanding debts at the time of the trial, nor any proof of there being any creditor except the defendant, and he may be considered in the double character of creditor and purchaser. The facts in evidence as to him are merely these: that in May or June, 1820, Mr. Wynne delivered to his son a bond and mortgage for defendant and title deeds, and the mortgage and title deeds related to the same premises as Mr. Garnons' mortgage. What was the nature of the

defendant's debt did not appear, or what was the consideration for the bond and mortgage. Whether any money was advanced when such bond and mortgage was given, or whether it was for a pre-existing debt, whether it was obtained by pressure from the defendant, or given voluntarily and of his own motion by Mr. Wynne, and whether the defendant knew of it or not, are points upon which there was no proof, and under these circumstances we cannot say the defendant made out a case to entitle him to treat Mr. Garnons' deed as void under either of the Statutes of Elizabeth. Should he be able hereafter to show that his mortgage is entitled to a preference, the present verdict will be no bar to his claim. For these reasons we are of opinion that the rule for a new trial must be discharged.

Rule discharged.

HALL v. HARRIS ET AL.

5 Ired. Eq. (N. C.) 303. 1848.

CAUSE removed from the Court of Equity of Montgomery County, at the Spring Term, 1848.

The facts in this case are fully stated in a case between the same parties, *Hall v. Harris*, 3 Ired. Equity, 289, and so much of them as is necessary to the understanding of the decision now made is set forth in the opinion of the court here delivered.

PEARSON, J. When this case was before this court at June Term, 1844, it was decided, that an execution does not bind equitable interests and rights of redemption from its *teste*, as in ordinary cases, but from the time of "execution served;" and it was declared that the plaintiff would be entitled to a decree, provided the deed, under which he claimed, took effect before the execution, under which the defendant Harris claimed, was issued. 3 Ired. Eq. 289.

We are satisfied, that the view then taken of the case was correct. The rights of the parties depend upon that single question.

The execution issued on the 7th of March, 1840. The plaintiff alleges, that the deed took effect on the 2d of March, 1840. The facts are, that on the 2d of March the plaintiff and the defendant Morgan made an agreement, by which the plaintiff was to give Morgan \$725, for the land, to be paid, a part in cash, and the balance in notes and specific articles, as soon as the plaintiff was able, which he expected would be in a few days, and Morgan was to make a deed to the plaintiff, and hand it to Col. Hardy Morgan, to be by him handed to the plaintiff, when he paid the price. Accordingly on that day the plaintiff paid to Morgan a wagon and some leather, which was taken at the price of \$57.50 and Morgan signed and sealed the deed, and handed it to Col. Morgan to be handed to the plaintiff, when he paid the balance of the price. The deed was witnessed by Col. Morgan and one Sanders, and is dated on the 2d of March. Afterwards on the

tenth of March, the plaintiff paid to Morgan the balance of the \$725, with the exception of \$152, for which Morgan accepted his note, and the deed was then handed to the plaintiff by Col. Morgan.

The question upon these facts is, whether the deed take effect from the 2d or from the 10th of March? We are of opinion, that it takes effect from the 2d, at which time, according to the agreement, it was signed, sealed, and delivered to Col. Morgan, to be delivered to the plaintiff, when he should pay the price. The effect of the agreement was to give the plaintiff the equitable estate in the land, and to give Morgan a right to the price. The purpose, for which the deed was delivered to a third person, instead of being delivered directly to the plaintiff, was merely to secure the payment of the price. When that was paid, the plaintiff had a right to the deed. The purpose, for which it was put into the hands of a third person, being accomplished, the plaintiff then held it in the same manner, as he would have held it, if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way.

It is true, the plaintiff was not absolutely bound to pay the balance of the price. Perhaps, he had it in his power to avail himself of the Statute of Frauds, and it would seem from the testimony, that, at one time, he contemplated doing so, on account of some doubt as to the title; but he complied with the condition and paid the price. His rights cannot be affected by the fact, that he might have avoided it. If the vendor had died, after the delivery to the third person, and before the payment, the vendee upon making the payment, would have been entitled to the deed; and it must have taken effect from the first delivery; otherwise, it could not take effect at all. The intention was, that it should be the deed of the vendor from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide* and not a contrivance to interfere with the right of creditors, of which there is no allegation in this case, it must be allowed to take effect.

A distinction is taken in the old books, between a case, when a paper, being signed and sealed, is handed to a third person, with these words: "Take this paper and hand it to A. B. as *my deed* upon condition," &c., and a case where these words are used, take "*This deed* and hand it to A. B. upon condition," &c. In the latter case it takes effect presently; while in the former, it is held, in most cases, not to take effect until the second delivery. Touchstone, 58, 59.

The distinction, upon which this "diversity" is made, would seem too nice for practical purposes, to be a mere play upon words. The intention of the parties, whether one set of words be used or the other, is to make it a deed presently, but to lodge it in the hand of a third person, as a security for the performance of some act. If it was not to be a deed presently, provided the condition be afterwards performed, the maker would hold it himself, and the agency of the third person

would be useless. Indeed the idea, that the third person is a *mere agent* to deliver the paper as a deed, if particular words be used, "escrow" for instance, even by the old cases, has many exceptions, and the deed is allowed, in such cases, to take effect. As if the maker dies, as in the case above put; or becomes *non compos mentis*; or, being a *feme sole*, marries; or if the vendor should create any encumbrance, as by making a lease; in all such cases, when the paper was handed to the third person to be *delivered as a deed* upon condition, &c., it is allowed to take effect from the first delivery, in order to effectuate the intention of the parties. In other words, when it can make no difference, the deed takes effect from the second delivery, but if it does make a difference, then the deed takes effect from the first delivery. This entirely yields the question. The last exception cited above, as to the relation of the deed, in case of "escrow" to avoid a lease, takes in the case under consideration; for it is the same, whether the encumbrance, to be avoided, proceeds from the act of the party, or from the effect of an execution, as the object is to make the deed effectual and to carry out the intention. *State v. Pool*, 5 Ired. 105.

But, in truth, the distinction cannot be acted upon — it is merely verbal, and whether one set of words would be used, or the other, would be the result of mere accident. The law does not depend upon the accidental use of mere words "trusted to the slippery memory of witnesses." It depends upon the act, that a paper, *signed and sealed*, is put out of the possession of the maker. It must be confessed (and with reverence I say it), that many of the *dicta* to be found in the old books, in reference to deeds, are too "subtle and cunning" for practical use, and have either been passed over in silence, or wholly explained away.

We are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another upon a condition, which is afterwards complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention, that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time, as, if, no fraud being suggested, the paper is handed to the third person, before the parties have concluded the bargain, and fixed upon the terms; which cannot well be supposed ever to be the case; for in ordinary transactions, the preparation of deeds of conveyance, which is attended with trouble and expense, usually comes *after* the *agreement* to sell.

There must be a decree for the plaintiff, with costs against the defendant Harris.

PER CURIAM.

*Decree accordingly.*¹

¹ *Whitfield v. Harris*, 48 Miss. 710, accord. And see *Dettmer v. Behrens*, 106 Iowa 585. But compare *Wolcott v. Johns*, 7 Colo. App. 360; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666.

BAKER ET AL. v. SNAVELY ET AL.

84 Kan. 179. 1911.

APPEAL from Finney district court. Opinion filed March 11, 1911. Affirmed.

The opinion of the court was delivered by

SMITH, J.: William Weisiger was the record owner of the lots in question. On the 6th day of November, 1901, one Clarence Ford obtained a tax deed to the lots, and his right thereto was conveyed to John Baker, who, subsequently, and on the 5th day of October, 1905, brought this action in the district court of Finney county to quiet his title to the lots against Weisiger and wife and others. Service was made by publication. On the 21st day of November, 1905, judgment was rendered in favor of the plaintiff quieting his title.

On March 3, 1906, Weisiger and wife filed their motion and affidavit to open the judgment, and also filed an answer to the petition of Baker, in which they made a general denial of the allegations of the petition, and, for a second defense, alleged that the tax deed upon which the plaintiff based his title was null and void. On April 21, 1906, the motion to open the judgment was allowed.

September 22, 1906, the Weisigers filed a motion to make S. C. Thompson a party defendant, which motion was sustained November 30, 1906, and summons served on Thompson on December 2, 1906. Permission was also given the Weisigers, on November 30, 1906, to file an amended answer and cross-petition, in which, in addition to the allegations of the former answer, they alleged that defendant Thompson purchased the property in controversy on or about the 31st day of March, 1906, from Noah B. Matkins, to whom the plaintiff, John Baker, on the same day had conveyed the property; that both transfers were made with the full knowledge of the interest of the Weisigers in the property, and were made for the purpose of defrauding them out of their interest therein, and that such transfers were null and void as against them.

Relation back as against the heir of the grantor. *Davis v. Clark*, 58 Kan. 100; *Guild v. Althouse*, 71 Kan. 604; *Cook's Adm'r. v. Hendricks*, 4 T. B. Mon. (Ky.) 500; *Tharaldson v. Everts*, 87 Minn. 168; *Webster v. Trust Co.*, 145 N. Y. 275. See *Jackson v. Jackson*, 67 Oreg. 44; *Vorheis v. Kitch*, 8 Phila. (Pa.) 554; *Gammon v. Bunnell*, 22 Utah 421. Contra, *Teneick v. Flagg*, 29 N. J. L. 25 (*semble*).

As against one, who, after the delivery in escrow but with knowledge thereof, purchases the land from the grantor. *Cannon v. Handley*, 72 Cal. 133; *Conneau v. Geis*, 73 Cal. 176; *McDonald v. Huff*, 77 Cal. 279; *Leiter v. Pike*, 127 Ill. 287; *Lewis v. Prather*, 14 Ky. L. Rep. 749.

No relation back as against a bona fide purchaser from the grantor after the delivery in escrow and before the performance of the condition. *Waldock v. Frisco Lumber Co.*, 176 Pac. (Okl.) 218; *May v. Emerson*, 52 Oreg. 262 (see Oreg., Laws (1920), § 301).

On August 23, 1907, by leave of court and with the consent of the Weisigers, Thompson filed an answer in which he admitted that he claimed an interest in the property, and made a general denial to the allegations of the cross-petition, alleging, in substance, that he purchased the premises from Noah B. Matkins on the 10th of January, 1906; that Matkins executed a warranty deed conveying the premises to him; that at that time he was actually occupying the premises, and has ever since continued in the possession thereof; that he purchased the property in good faith, after taking legal advice that the title to the premises was in Noah B. Matkins, and after being advised by counsel that the title to the property had been quieted in the action of John Baker against Mary H. Snavely *et al.*; that he made a payment on the property, and took it subject to a mortgage for \$1650, which he had since paid off and discharged; that at the time of the purchase he had no notice of any claims by defendant William Weisiger, and bought the property in good faith; that the tax deed in question was recorded in the office of the register of deeds of Finney county on the 7th of November, 1901, that five years had expired after the recording of the deed prior to any pleading filed by defendant Weisiger against this defendant; and that the action, as to him, was barred by the five-year statute of limitation.

Trial was had before Charles E. Lobdell, judge *pro tem.*, and the following findings of fact and conclusions of law were made:

“ FINDINGS OF FACT.

“(1) That the defendant, Weisiger, is the owner of the fee or patent title to the property in controversy, unless such title is extinguished by the tax deed to Baker or by the judgment heretofore rendered in this case and subsequent conveyances which are claimed to have been accepted in good faith and in faith of such judgment.

“(2) That on November 21, 1905, the plaintiff, John Baker, obtained judgment in this court and in this cause quieting title in him to the land in controversy against the defendants, Weisigers.

“(3) That on November 28, 1905, John Baker executed a sufficient deed of general warranty to the property in controversy to Noah B. Matkins and placed the same in escrow for future delivery with G. L. Miller.

“(4) That on March 3, 1906, the defendants, William Weisiger and wife, filed in this court their motion, in proper form, to open up the judgment thereinbefore rendered in favor of Baker as recited in finding No. 2.

“(5) That thereafter, and on April 21, 1906, by the consideration of this court such decree and judgment was fully set aside and opened up.

“(6) That on March 31, 1906, the deed from Baker to Matkins was, by Miller, delivered to Matkins.

"(7) That on February 19, 1906, Noah B. Matkins, a single man, executed a sufficient warranty deed to the property in controversy to the defendant S. C. Thompson, which deed was placed in escrow with G. L. Miller, as was the deed from Baker to Matkins.

"(8) That on the same date that the deed from Baker to Matkins was delivered by Miller the deed from Matkins to Thompson was by Miller delivered to Thompson.

"(9) That Thompson took possession of the property in controversy on January 6, 1906, and has been continuously in possession since that time.

"(10) That the title of Baker at the time of his judgment rested upon the tax deed introduced in evidence.

"(11) That a part of the consideration for the tax deed on which Baker's title rested was what was known as 'current university tax,' levied for the year 1896.

"(12) That the so-called redemption notice for the lots in controversy, published by the county treasurer of Finney county, contained in the amount stated as necessary to the redemption of said lots the sum of thirty-five cents as costs for advertising, and included it for each of the three years embraced in the notice necessary to redeem, and that the treasurer's fee of twenty-five cents was also included in the notice for each year."

"CONCLUSIONS OF LAW.

"(1) That the tax deed to Baker is voidable and should be set aside because of the facts stated in findings 11 and 12.

"(2) That the creation of the escrow with reference to the deeds from Baker to Matkins and Matkins to Thompson was not in law delivery of the deeds.

"(3) That the delivery of such deeds, which actually took place on March 31, 1906, can not be made to relate back so as to relieve Thompson and Matkins of the effect of the notice to open up judgment, which motion was filed before the escrow was terminated.

"(4) That at the time of the delivery of their deeds to them Matkins and Thompson had constructive notice, which was binding upon them, of the motion then filed and pending in this cause to open up and vacate the judgment, and that neither of them was a purchaser in good faith and in faith of such judgment."

The contention of the appellees is that the deed from Baker and his wife to Matkins did not become a conveyance of the property until the actual delivery thereof on the 31st of March, 1906, that the deed from Matkins to Thompson did not become an actual conveyance until the same date, and that Thompson had constructive notice of the pendency of the action before the deed was delivered to him.

Upon the other hand, the appellant contends that both the deed

from Baker to Matkins and the deed from Matkins to him were executed long before the motion to reopen the judgment was filed, on March 3, 1906; that the considerations therefor were paid in part at the time of the execution of the contracts, and the remainder in full when the deeds were delivered, on March 31, 1906; that they were in escrow with Miller from the time of their execution until their actual delivery, and that when the actual delivery was made, on March 31, 1906, the delivery dated back to the time of the original contracts and partial payments. These adverse contentions constitute the only substantial question in the case.

Whether a deed executed and placed in escrow relates back to the time of the contract and execution thereof, so as to vest the grantee with the full title from that time, or whether it becomes such conveyance only upon the full performance of the conditions, seems to depend upon which of the two theories will promote justice under all the circumstances of the individual case.

"This doctrine of relation (from the time of the second delivery to the time of the delivery in escrow) is of ancient origin, and has always been applied, both at law and in equity, to meet the requirements of justice, to protect purchasers, and to effectuate the intent of the parties to contracts." (*Scott v. Stone*, 72 Kan. 545, 548, citing numerous cases.)

The syllabus in that case states the rule strongly, without exception, and holds that, under the circumstances of that case, the delivery dated back to the time of making the contract. The same doctrine was upheld in *Davis v. Clark*, 58 Kan. 100. In each of those cases justice clearly required that the conveyance be held as of the date of the delivery in escrow and not as of the date of the second delivery.

In a case similar to this, *Hill v. Miller*, post, 196, as between the rights of a purchaser from a tax-deed holder and the holder of the patent title, who had brought an action to set aside a decree quieting the title, it was said:

"At all events he [the purchaser] was not protected by the statute unless he bought and paid for the land prior to January 18, 1908, the date when the proceeding was begun to set aside the decree quieting title." (p. 198.)

No finding is made by the court in this case in regard to any payment made by the appellant prior to the delivery of the deed from the party holding it in escrow, which was twenty-eight days after the filing of the motion to set aside the judgment. Nor does the appellant disclose in his evidence how much he paid toward the purchase price, at or prior to the time of the execution of the deed. The evidence is that he made a payment. According to the evidence, he purchased seventeen lots for \$3500, nearly \$206 per lot, and assumed the payment of a mortgage for \$1650, which he afterward paid, leaving \$1850, upon which "a payment" was made at

the time of purchase, and the remainder March 31, 1906. The three lots involved in this action would, at the price, amount to about \$618, leaving over \$1200, less such payment as he may have made, and the amount of which he does not disclose, to protect himself against any failure of title. He was bound to take notice, at the time he actually received his deed and made final payment, of the proceeding to vacate the judgment quieting the title, and, as he has failed to show that he was unable to protect himself from any loss, if the title to the lots should eventually be shown to be in the appellees, there is no reason for holding that the second delivery of the deed related back to the time it was delivered in escrow.

On the other hand, the invalidity of the tax deed is not contested, and the appellees' equities in the case are very strong. We think the court correctly decided the case. We have not considered various other assignments of error, as it seems to be conceded that the case must turn upon this one question.

*The judgment is affirmed.*¹

WHEELWRIGHT ET AL. v. WHEELWRIGHT

2 Mass. 447. 1807.

THE petitioners set forth that Joseph [Wheelwright] is seised in fee simple of four undivided ninth parts, and the other petitioners of two undivided ninth parts, of thirty-one acres of salt-marsh lying in Wells, in common with the said Aaron Wheelwright, and they pray that their respective parts may be set off to them in severalty.

The respondent pleads in bar that Samuel Wheelwright, grandfather of the respondent, on the 30th day of January, A.D. 1700, being seised in fee of the premises, made his last will in writing, which was afterwards duly proved, and by which he devised the premises to his son, Joseph Wheelwright, father of the respondent, in fee tail general, who entered and was seised, and from whom the premises descended to the respondent, as eldest son and heir in tail to his father,—and traverses the seisin in common with the petitioners, which they, in their replication, affirm, and tender an issue to the country, which is joined by the respondent.

Upon trial of this issue before *Thatcher, J.*, October Term, A.D. 1805, the respondent produced the last will of Samuel Wheelwright, by which it was admitted, for this trial, that the premises were devised in tail to Joseph, son of the testator, and father of the respondent, and also of Joseph W., one of the petitioners, and of the husband of Mary W., another of the petitioners, and grandfather of the

¹ And see *Price v. Pittsburgh Rd. Co.*, 34 Ill. 13; *Mohr v. Joslin*, 162 Iowa 34; *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288; Professor Harry A. Bigelow in 26 Harv. L. Rev. 565, 572-575.

remaining petitioners. It was also admitted that the respondent was the heir male of Joseph, his father.

The petitioners produced, in support of their claim, two deeds of the said Joseph, bearing date May 4, 1795, one whereof purported to be a conveyance of four ninth parts to the petitioner Joseph, and the other a conveyance of two ninth parts to the remaining petitioners; and they relied on these deeds to show that they were respectively seised, in fee simple, of the several shares so conveyed. Upon producing these deeds by the petitioners, the respondent called for the evidence of their execution before they should be read. Nathaniel Wells, Esq., was produced as a witness, who testified that, in the year 1795, the petitioner Joseph requested him, by direction from his father, as he said, to write those two deeds. Having written them, on the 4th of May, 1795, the father called upon him, and signed and sealed the two deeds in presence of the witness and his brother, since deceased, and delivered them for the use of the grantees, and that he and his brother subscribed their names as witnesses. That it was the intent of the parties that the grantor should have the use of the premises during his life; and as some of the grantees were minors, and could not secure the use to him, that the deeds were delivered as *escrows*, as he expressed it, to be delivered by him to the grantees upon the death of the grantor, which the witness has accordingly done. That the witness understood from the grantor that his intent, in executing the deeds, was to prevent the entail from depriving the grantees of the land conveyed.

The counsel for the respondent objected to the reading of the deeds to the jury upon this evidence, upon the ground that there was no proof that the same, or either of them, was duly executed and delivered by the grantor in his lifetime to either of the grantees, or to any person authorized by them, or either of them, to receive the same; and that if they had been duly executed and delivered, they were not made *bona fide*, but merely and for the express purpose of destroying the entail of said lands.

The judge overruled the objection, permitted the deeds to go in evidence, and directed the jury that they were sufficient and legal evidence to maintain the issue on the part of the petitioners. After a verdict for the petitioners, the respondent's counsel filed exceptions to the above opinion and direction of the judge, which were allowed and signed pursuant to the Statute, and at the last July Term of the court, the question of the validity of those exceptions came on to be argued.

The cause was continued for advisement, and at this term the opinion of the court was delivered by

PARSONS, C. J. (who stated the history of the cause, and proceeded). The right which the father of the respondent had to convey any of the lands he held in tail must be derived from the Statute of March 8, 1792. By that Statute it is made lawful for any person

of full age, seised in fee tail of any lands, by deed duly executed before two subscribing witnesses, acknowledged before the Supreme Judicial Court, Court of Common Pleas, or a justice of the peace, and registered in the records of the county where the lands are, for a good or valuable consideration, *bona fide* to convey such lands, or any part thereof, in fee simple, to any person capable of taking and holding such estate; and such deed, so made, executed, acknowledged, and registered, shall bar all estates tail in such lands, and all remainders and reversions expectant thereon.

From inspecting the deeds produced in evidence in this cause, it appears that two subscribing witnesses, to whose credibility no objection is made, have certified that they were signed, sealed and delivered, in their presence. And it further appears that the grantor, on the same day, acknowledged that each instrument was his deed before a justice of the peace.

One objection made by the respondent is, that, admitting the deeds to have been executed in the form and manner required by the Statute in this case, yet these conveyances are not *bona fide*, being made, not for a valuable consideration, but for the purpose of depriving the heir in tail of his inheritance. The deeds purport to be for a valuable consideration in money, and for love and affection to his issue, which is a *good* consideration. The Statute also provides that the conveyance may be on *good* consideration. It is therefore very clear that the Statute intended that the tenant in tail might bar the heir in tail, by deed conveying the land to his relatives, executed for a good although not a valuable consideration. This he might do by a common recovery; and this method by deed is substituted by the Statute in the place of that common assurance, the effect of which is founded on legal fictions. And it is certain that justice, or parental affection, will often induce parents who hold their lands in tail to make provision for the younger branches of their family out of the entail. As the Statute has made the estate tail assets for the payment of the debts of the tenant, before and after his decease, a *bona fide* conveyance was required by the Statute, to prevent alienations to defraud creditors, and not to protect the heir in tail. This objection cannot prevail.

The other objection is that, by the Statute, the conveyance should be completed, and the estate pass, in the lifetime of the tenant in tail, and that the deed should be sealed, delivered, and acknowledged, by him as his deed; that, in the case at bar, the deeds were delivered by the grantor to Judge Wells, not as his deeds, but as his writings or *escrows*, to be delivered as his deeds by the judge to the grantees on his, the grantor's death; that they could have no effect until delivered by the judge accordingly; and, as the grantor was dead before the second delivery, they were never his deeds, but are void.

This objection seemed to deserve much consideration. The Statute certainly intended that the conveyance of the estate tail should

be executed in the lifetime of the tenant; and therefore, if there be no acknowledgment of the deed by him, the defect cannot be supplied by the testimony of the subscribing witnesses after his death, as it may be in conveyances of estates not entailed. The reason is, as common recoveries must be suffered in the lifetime of the tenant in tail, and at a court holden at stated times, and the heir in tail has a chance that the tenant may, after the commencement of the suit, die before the term, so it was intended to leave him the chance of the tenant's dying before acknowledgment, which, as the Statute was first drawn, could be made only in some court of record; although, as it was amended, it may now be made before a justice of the peace. There is therefore some chance saved to him, but of much less consequence than it was before the bill was amended.

The law, so far as it relates to the nature of this objection, is very well settled. If a grantor deliver any writing *as his deed* to a third person, to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of *non est factum*, whether generally or specially pleaded. This appears from Perk. 143, 144, and from the case of *Bushell v. Pasmore*, 6 Mod. 217, 218. But if the grantor make a writing, and seal it, and deliver it to a third person, as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his, the grantor's deed, — and it be delivered to the grantee accordingly, — it is not the grantor's deed until the second delivery; and if the grantee obtain the possession of it before the event happen, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. This appears from Perk. 142, 137, 138.

It is generally true that a deed delivered as an escrow, to be delivered over as the deed of the party making it, on a future event, takes its effect from the second delivery, and shall be considered as the deed of the party from that time. Perk. 143, 144; 3 Co. 35 b, 36 a.

Whether the deeds in this case were delivered to Judge Wells as writings to be delivered over as the grantor's deeds on his death, or whether they were delivered as the deeds of the grantor to Judge Wells, in trust for the grantees, to be delivered to them on the grantor's death, is a question of fact, to be determined by the evidence. This evidence results from the testimony of Judge Wells, and from the inspection of the deeds. The deeds appear to have been signed, sealed, and *delivered*, in the presence of two subscribing witnesses, and to have been acknowledged as the deeds of the grantor before a justice of the peace. The witness swears that the grantor did then sign, seal, and deliver, them for the use of the grantees. Thus far there can be no doubt. But the witness further testifies that, because

the grantor was to have the use of the premises during his life, and some of the grantees being minors, the deeds were delivered to him as escrows, to be delivered to the grantees upon the grantor's death. What the witness understood by escrow is not explained. He might consider them as escrows, because he was to have the custody of them until the grantor's death. To aid his memory, he therefore refers us to the memorandum he made, at the time, upon the wrapper of the deeds. In that memorandum they are called the two deeds of the grantor, naming him, to the grantees, naming them, to be kept until the death of the grantor, and then to be delivered to the grantees. Here they are not called the writings, or escrows, but the deeds, of the grantor. The weight of the evidence is certainly very great, if not conclusive, in favor of the deeds having been delivered by the grantor, as his deeds, and deposited with Judge Wells, in trust for the grantees. Upon this ground the deeds were very properly admitted as evidence, and the direction of the judge was correct.

But if the deeds are to be considered as delivered to Judge Wells, not as the deeds, but as the writings, of the grantor, we must not thence conclude that they are void. Although generally an escrow takes its effect from the second delivery, yet there are excepted cases, in which it takes its effect, and is considered the deed of the maker, from the first delivery. The exception is founded on necessity, *ut res valeat*. Thus Perk. 139, 140. If a *feme sole* seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise, her marriage would defeat it. In Brook's Reading, on the Statute of Limitations, p. 150, there is another exception. A. delivers a deed, as an escrow, to J. S., to deliver over on condition performed, before which A. becomes *non compos mentis*; the condition is then performed, and the deed delivered over; it is good, for it shall be A.'s deed from the first delivery. Another exception is in 3 Co. 35 b, 36 a. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after, it is delivered over on condition performed: the lease shall be the deed of the lessor from the first delivery. There is also a strong exception in 5 Co. 85. If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed — here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate; but it shall be deemed consummate by the performance of the condition.

Therefore, if the deeds in this case were delivered to Judge Wells as escrows, and by him delivered over on the death of the grantor, they must take their effect, and be considered as the deeds of the grantor, from the first delivery, he being dead at the second delivery. And the cases in 3 Co. 36 a, and 5 Co. 85, are in point. It may

here be observed, that it is not to be presumed that it was the intention of the grantor to deliver these deeds as escrows, to be after delivered as his deeds, on the event of his death; when, from the nature of the event, they could not be considered as his deeds from the second delivery. The presumption is violent that he considered Judge Wells as a trustee of the grantees. But whether the deeds were delivered to him as escrows, or in trust for the grantees, — in either case the verdict must stand, and the first judgment to be entered thereon, namely, that partition be made; and let a warrant issue to commissioners to make partition.¹

NOLAN ET AL. v. OTNEY ET AL.

75 Kan. 311. 1907.

ERROR from Washington district court; WILLIAM T. DILLON, judge. Opinion filed March 9, 1907. Affirmed.

MASON, J.: Martin Dolan executed an instrument purporting to be a warranty deed conveying property to Joseph Otney, but containing these words immediately following the granting clause, which was in the usual form:

“This deed is made with the understanding that the same is not to take effect or be in force until the death of the grantor, and upon the death of the grantor is to take effect and at said time to vest in the said grantee the absolute title in fee simple of the property above described.

“And it is further understood that the said Joseph Otney is to take care of and maintain the said M. Dolan, a single man, during the balance of his natural life.”

The instrument was placed in the hands of a third person, to be delivered after the grantor's death to the grantee. Dolan died and

¹ Cases where the contest was between the heir or devisee of the grantor and the grantee are *Hutton v. Cramer*, 10 Ariz. 110; *Bury v. Young*, 98 Cal. 446; *Schuur v. Rodenback*, 133 Cal. 85; *Shea v. Murphy*, 164 Ill. 614; *Bogan v. Swearingen*, 199 Ill. 454; *DeGraff v. Manz*, 251 Ill. 531; *Stout v. Rayl*, 146 Ind. 379; *Lippold v. Lippold*, 112 Iowa 134; *White v. Watts*, 118 Iowa 549; *Schillinger v. Bawek*, 135 Iowa 131; *Young v. McWilliams*, 75 Kan. 243; *Foster v. Mansfield*, 3 Met. (Mass.) 412; *Loomis v. Loomis*, 178 Mich. 221; *Wickland v. Lindquist*, 102 Minn. 321; *Dickson v. Miller*, 124 Minn. 346; *Williams v. Latham*, 113 Mo. 165; *Rowley v. Bowyer*, 75 N. J. Eq. 80; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285; *Stonehill v. Hastings*, 202 N. Y. 115; *Ball v. Foreman*, 37 Ohio St. 132; *Reeder v. Reeder*, 50 Oreg. 204; *Kittoe v. Willey*, 121 Wis. 548; *Wells v. Wells*, 132 Wis. 73. See *Hathaway v. Payne*, 34 N. Y. 92.

Compare *Wittenbrock v. Cass*, 110 Cal. 1; *Stewart v. Stewart*, 5 Conn. 317; *Grilley v. Atkins*, 78 Conn. 380; *Owen v. Williams*, 114 Ind. 179; *Smiley v. Smiley*, 114 Ind. 258; *Brown v. Austen*, 35 Barb. (N. Y.) 341; *Rathmell v. Shirey*, 60 Ohio St. 187; *Ladd v. Ladd*, 14 Vt. 185; *Schreckhise v. Wiseman*, 106 Va. 9.

the delivery was made. The heirs brought a suit against Otney to have the deed set aside. The court sustained a demurrer to their evidence, and they prosecute error.

Some months before his death Dolan handed the deed to one John Grimes, with directions after his death to give it to Otney. On the same occasion, however, Dolan said to Grimes: "Of course, if I ask you for the deed you would give it to me." Grimes answered that he certainly would, and Dolan responded: "Martin will never ask for it." The day before he died, however, he gave Grimes instructions in the presence of Otney to deliver the deed after his death, provided Otney should haul some corn, pay a sum of money, and give a note for \$100. These conditions were fully complied with, and, after the death of Dolan, Grimes handed the deed to Otney.

The question which has been discussed by counsel is whether the language of the deed, in connection with the circumstances attending its delivery, shows the grantor to have intended that no title should pass until his death, in which case it would be testamentary in its character and therefore inoperative. [The court then considered *Durand v. Higgins*, 67 Kan. 110; *Uhl v. Railroad Co.*, 51 W. Va. 106, 114; *Love v. Blauw*, 61 Kan. 496, 501; *West v. Wright*, 115 Ga. 277; *Hunt v. Hunt*, 82 S. W. (Ky.) 998; and continued as follows:]

Applying the reasoning of these cases to the facts here presented, we are convinced that the real purpose of Dolan, so far as disclosed by the language of the deed now under consideration, notwithstanding his failure to express it in correct terms, was to vest a title immediately in Otney, reserving only a life-interest in himself; that is to say, the deed should be taken to mean this in the same sense and for the same reasons that such meaning is imputed in the case of the deposit of an ordinary deed under the same circumstances — the words relied upon to change the usual rule do not have that effect. (See as to the general rule *Young v. McWilliams*, ante, p. 243.)

A further question arises with respect to the paragraph of the deed relating to the obligation of the grantee to care for and maintain the grantor during the remainder of his life. A very similar provision was held, in *Culy v. Upham*, 135 Mich. 131, 97 N. W. 405, 106 Am. St. Rep. 388, to make the instrument testamentary in character, and therefore invalid. [The court then discussed *Culy v. Upham*, and continued as follows:]

In the present case, although a part of the consideration of the deed was that the grantee should care for the grantor, the delivery to him was nowhere made to depend upon his doing so. The argument of the Michigan case has therefore no application to the provision referred to, and no reason appears for regarding such provision as fatal to the validity of the deed.

Nevertheless the effect of imposing a condition upon the delivery by the custodian is here involved, for the last instructions given to Grimes included a direction to hold the deed until Otney should

perform certain acts, including the giving of a note. Probably the question whether there was a valid delivery must be determined by what took place at that time, for during the first conversation on the subject the understanding seemed to be that Dolan had not relinquished control, and such understanding was inconsistent with an effectual present delivery. (*Cole v. Cole*, [Mich.], 108 N. W. 101.)

In *Taft v. Taft*, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291, after an elaborate review of the authorities, the conclusion was reached that no valid delivery can be accomplished by the deposit of a deed with a custodian who is directed to hold it not only until the grantor dies but until the grantee does something on his part, and then deliver it — at least that such is the rule unless the required act is one intended to be performed, or at all events capable of performance, while the grantor is yet alive. Otney did all the acts necessary to entitle him to the deed. Whether or not he in fact performed them before Dolan died, he might have done so, and his doing so may have been within the contemplation of the parties. But we do not care to rely upon this distinction. The view that no effect can be given a deed placed by the grantor in the hands of a third person to be delivered upon his death, if the performance of some act by the grantee is made a condition of such delivery, is supported only by artificial reasoning. It proceeds upon substantially this argument: A deed entrusted to a stranger for delivery at the grantor's death can be upheld only upon the theory that it is not an escrow, but that the title passes when such deposit is made; and where the delivery to the grantee is made to depend upon some act of his, the instrument is an escrow, and conveys no title until finally delivered, or at any rate until such act is performed. But while it is true that ordinarily title is not changed by an escrow until it is rightfully delivered — or until conditions have arisen such that it of right ought to be delivered — to the grantee, it is often held that such delivery when made will be deemed to operate by relation as of the time the deposit was made. This is uniformly done when, as in *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563, the death of the grantor makes an effective delivery thereafter theoretically impossible. (16 Cyc. 588; 11 A. & E. Encycl. of L. 346.) The fiction of an earlier delivery by relation is adopted in such cases to prevent a manifest hardship and wrong. No reason is apparent why it may not be invoked in such a case as the present to effectuate the lawful intentions of the parties. The very conception that a deed deposited with a stranger to be delivered at the grantor's death operates as a present conveyance is a fiction of like character adopted for a like purpose. (16 Cyc. 566.) [The court then quoted from *Craddock v. Barnes*, 142 N. C. 89, 96, 97.]

It is true that in the case of an ordinary escrow it is the expectation of the parties that the matter shall be fully closed up before

any of them die, and where the death of one of them intervenes it occasions a situation that was never in their contemplation, while here an arrangement was deliberately made that the practical operation of the deed should begin after the death of the grantor, and after the fulfilment of the stated conditions. But we do not perceive in this fact any reason for resorting to a fiction to support one transaction rather than the other.

To call the requirement imposed on the grantee a condition precedent to the vesting of title is to beg the question; if the title is regarded as passing with the delivery of the instrument to the custodian it is a condition subsequent, upon the non-performance of which the title will revert. So far as the grantor and his heirs are concerned there is no possible hardship in considering that when he has placed the deed beyond his recall — when in spite of anything he can do it must ultimately become fully effective — it becomes operative in contemplation of law at once. No difficulty is presented with respect to the intervening rights of creditors, because as against them no resort could be had to the fiction. The situation in this respect is not affected by the conditions attached to the final delivery, for the same distinction is made where none is imposed. Such a case was presented in *Rathmell, Exr., v. Shirey et al.*, 60 Ohio St. 187, 53 N. E. 1098, although the instrument is there spoken of and treated as an escrow. The syllabus reads:

“An instrument for the conveyance of lands without substantial valuable consideration, deposited with a third person as an escrow to be by him delivered to the grantee on the death of the grantor, does not, by relation, vest the title in the grantee at the date of the first delivery to the prejudice of persons who thereafter, without knowledge of the instrument, extend credit to the grantor.”

In the opinion it was said:

“Whatever terms may be employed in stating the exception, the relation back to the first delivery is always to accomplish, and never to defeat, justice. Bearing in mind the purpose of this exception, and the fact that the deed before us was without any substantial consideration, it is quite apparent that the conclusion of the circuit court that the relation back should be allowed to cut off the claims of those who gave credit to the testator between the first and second deliveries, and without knowledge of the instrument is erroneous. That conclusion derives no support from *Crooks v. Crooks*, 34 Ohio St. 610, or *Ball v. Foreman*, 37 Ohio St. 132, where the title was held to pass as of the date of the first delivery for purposes clearly within the exception as above stated.” (Page 198.)

The theoretical difficulties regarding the location of the title prior to the performance of the conditions, if the principle of relation is applied in this case, are really no greater than in any other where resort to the fiction is had; for instance, in those cases where there is no actual acceptance until after the grantor's death. Ac-

ceptance is of course essential to the validity of any deed, yet it is common for deeds to be upheld of the existence of which the grantee never heard in the lifetime of the grantor, his acceptance being permitted to be operative by relation as to the time the grantor surrendered control. Where its terms are purely beneficial to the grantee his acceptance is presumed, but this is only a matter of evidence.

"As stated by Justice Ventris in *Thomson v. Leach*, 2 Vent. 198, a man 'cannot have an estate put into him in spite of his teeth.' But the presumption that a person will accept a pure, unqualified gift is so strong that the courts have quite generally manifested a disposition to act upon such presumption in the interim as a working rule for the operation of conveyances." (*Emmons v. Harding*, 162 Ind. 154, 159, 70 N. E. 142.)

If under such circumstances the beneficiary should finally from any whim or caprice refuse to accept the deed, when after the death of the grantor he learns of its existence, the situation would not be greatly different from that presented by his failure to perform an affirmative act where one is required of him as a condition for its final delivery.

The question is not free from doubt, but our conclusion is that the deed here involved may be upheld upon the theory suggested. By such research as has been practicable in the time available for the purpose we have found but two modern cases other than those already cited in which the grantor placed a deed with a third person for delivery after his death upon conditions to be performed by the grantee. They are *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958, and *McCurry v. McCurry*, [Tex. Civ. App.], 95 S. W. 35. In each of these the deed was upheld, but in neither was there any extended discussion of the effect of the conditions.

The judgment is affirmed.

GREENE, BURCH, SMITH, PORTER, GRAVES, JJ., concurring.

JOHNSTON, C. J., concurs in the judgment, but not in all said in the opinion.¹

COOK v. BROWN

34 N. H. 460. 1857.

WRIT OF ENTRY.²

EASTMAN, J. The question which was found for the plaintiff, and upon which the verdict was rendered, was the delivery of the

¹ Compare *Prewitt v. Ashford*, 90 Ala. 294; *Hunter v. Hunter*, 17 Barb. (N. Y.) 25; *DeBow v. Wollenberg*, 52 Oreg. 404; *Davis v. Brigham*, 56 Oreg. 41; *Campbell v. Thomas*, 42 Wis. 437; *Graham v. Graham*, 1 Ves. Jr. 272; Professor Ralph W. Aigler in 16 Mich. L. Rev. 569.

² Only the opinion, and only that part of the opinion which relates to the question of delivery, is given.

deed by Mrs. Brown, the defendant's husband, to Richard F. Fifield. If this deed was not delivered, the demandant was entitled to recover; and the jury, under the rulings and instructions of the court, have found that it was not.

But were the instructions of the court correct in regard to the delivery of the deed? This is the important question of the case. The court instructed the jury that if the deed was in the hands of the depositary, to be delivered to the grantee, either before or after the death of the grantor, without the grantor's reserving a control over it, then there was a good delivery. But if the grantor reserved such a full control over the deed during her life, and to the last moment of her life, there was no delivery. If she always had the right to control the destination of the deed, there was not a delivery, but if she at any time relinquished her right in favor of the grantee, there was a delivery; that the question was, whether she always, until her death, continued to have the *right* to recall the deed, if she pleased, and not whether she did in fact recall it. The court were requested to instruct the jury, that if the deed was to remain in the hands of the depositary during the life of the grantor, subject, however, during that time to be revoked by the grantor, and if not revoked then to be recorded, the deed might be regarded as the deed of the grantor from the time of the delivery to the depositary, if it was not subsequently revoked. These instructions the court declined to give, and gave those which we have stated. The point of difference between the two was this: The court held that in order to make the delivery good, it was essential that the grantor should part with her dominion over the deed. That the time when the grantee was to receive it was not material, whether at or before the decease of the grantor, but that the delivery to the depositary must be without the power of recall in the grantor; while the defendant contended that if the deed was in fact delivered in pursuance of the directions of the grantor, it made no difference that the grantor had reserved the right of recalling the deed at any time.

In *Shed v. Shed et al.*, 3 N. H. 432, where A. made an instrument purporting to convey to his two sons, B. and C., certain tracts of land, with a reservation of the use of the land to himself during his life, and delivered the instrument to D. to be delivered to B. and C. as his deed, after his decease, in case he should not otherwise direct; and A. died without giving any further directions — it was held, that the instrument was to be considered as the deed of A. from the first delivery, and that it might operate as a covenant by A. to stand seised of the land to his own use during life, remainder to B. and C. in fee. Richardson, C. J., in delivering the opinion, says: "In the case now before us, the writing was intended to effect a mere voluntary disposition of the land; and why the grantor might not reserve to himself a right to revoke the writing if he saw fit, does not readily occur to our minds. If he might legally deliver the writing abso-

lutely, to take effect on his decease, we do not see why he might not deliver it conditionally, as an escrow, to take effect upon his decease, in case he did not change his mind and revoke it. Being the absolute owner of the estate, it seems to us that he had an incontestable right to deliver the instrument, absolutely or conditionally, according to his will and pleasure."

The decision in that case would appear to be in point for the defendant, but we do not find any other case in our own Reports; and but one or two in others, which go to that extent. On the other hand, there are many authorities which seem to us to establish a somewhat different rule.

In *Parker v. Dustin*, 2 Foster, 424, a grantor executed a deed and delivered it to a third person, with instructions to deliver it to the grantee upon the grantor's death. He afterwards told the grantee that he had given him the land, and directed him to take possession of it, which the grantee did, and afterwards remained in possession; and it was held, that it was a question of fact for the jury, upon the evidence, whether the grantor deposited the deed with the third person, to be delivered at his decease, without reserving any control over it during his life; and that the deed should be considered as delivered or not, as the finding of the jury might be on the question of his intention. That is to say, if he intended to reserve a control over the deed, it was no delivery; but if he did not so intend, it was a delivery.

In *Doe v. Knight*, 5 Barn. & Cres. 671, the court told the jury that the question was for them to decide whether the delivery to the depositary was, under all the circumstances of the case, a departing with the possession of the deed and of the power and control over it for the benefit of the grantee, and to be delivered to him, either in the lifetime of the grantor or after his death; or whether it was delivered to the depositary, subject to the future control and disposition of the grantor. If for the latter purpose, they should find for the defendant. The point in that case was distinctly put; the defendant was seeking to defeat the deed, and the court held the validity of the deed to depend upon the question, whether the delivery to the depositary was or not subject to the future control of the grantor.

In *Commercial Bank v. Reckless*, 1 Halstead's Ch. 430, it was held that, to constitute the delivery of a deed, the grantor must part, not only with the possession but with the control of it, and deprive himself of the right to recall it.

In *Baldwin v. Maultsby*, 5 Iredell 505, it was held that where there had been no delivery in the lifetime of the grantor, a delivery after his death, though at his request, is void.

In *Maynard v. Maynard*, 10 Mass. 456, the court, in speaking of the deed which was in controversy in that case, and of the grantor, say: "He probably chose to consider it as revocable at all times by

himself, in case of any important change in his family or estate. Whatever may have been his views, however, he retained an authority over it." It is the retaining of the authority over it that shows the delivery to be incomplete. *Jackson v. Phipps*, 12 Johns. 421; *Jackson v. Dunlap*, 1 Johns. Cas. 114; 1 Devereux Eq. 14; C. W. Dudley's Eq. 14; *Hooper v. Ramsbottom*, 6 Taunton, 12; *Habergham v. Vincent*, 2 Ves. Jr. 231.

All of these authorities differ essentially from that of *Shed v. Shed*, and it appears to us that they are founded upon sounder principles.

The delivery of a deed is either absolute or conditional; absolute when it is to the grantee himself or to some person for him; when the grantor parts with all control over it, and has no power to revoke or recall it; conditional, when the delivery is to a third person, to be kept by him until some conditions are to be performed by the grantee. When the delivery is absolute, the estate passes at once to the grantee; but when conditional, the estate remains in the grantor until the condition is performed and the deed delivered over to the grantee. Strictly speaking, a conditional deed is not a deed, but an *escrow*, a mere writing, the effect of which is to depend upon the performance of the conditions by the grantee. If they are performed it becomes a deed, otherwise it is a mere nullity. Co. Lit. 36; Cruise, title 32, ch. 2; 2 Black. Com. 307; 4 Kent's Com. 454; *Jackson v. Catlin*, 2 Johns. 248; *Carr v. Hoxie*, 5 Mason, 60; Shep. Touch. 57, 58.

By fiction of law an *escrow* is sometimes made to take effect from the first delivery. The relation back to the first delivery, however, is allowed only in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery. 4 Kent's Com. 454; Perkins on Conveyancing, § 138; 3 Coke, 30; 3 Black. Com. 43; *Frost v. Bechman*, 1 Johns. Ch. 297; 5 Co. 84 b.

A deed which is put into the hands of a third person, to be delivered to the grantee on the happening of some future event, but where no conditions are to be performed, is not an *escrow* or conditional deed. Its delivery is not dependent upon any condition to be performed, but it is a valid deed from the beginning, and the holder is but a trustee or agent for the grantee. In such a case the grantor has parted with all control over the deed. Perkins, §§ 143, 144; 6 Mod. 217; *Foster v. Mansfield*, 3 Met. 412; 4 Kent's Com. 455; *Stillwell v. Hubbard*, 20 Wendell, 44.

But so long as a deed is within the control and subject to the authority of the grantor, there is no delivery. And whether in the hands of a third person or in the desk of the grantor, is immaterial, since in either case he can destroy it at his pleasure. To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing; it is

merely ambulatory, and gives no title. It is nothing more than a will defectively executed, and is void under the statute. Rev. Stat. chap. 156, § 6; *Habergham v. Vincent*, 2 Ves. Jr. 231; Powell on Dev. 13; 1 Rob. on Wills, 59; 4 Bro. Ch. 353; Rob. on Frauds, 337.

The case of *Habergham v. Vincent* was that of a deed, to take effect by way of appointment, after the death of the party. The subject was elaborately discussed and fully considered by the Chancellor and Justices Wilson and Buller. In the course of the discussion, Buller says: "A deed must take place upon its execution or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing that interest, to be conveyed at the execution, but a will is quite the reverse." And, after examining the various authorities upon the point, he adds: "These cases have established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity, and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but as upon the whole the intention was that it should have a future operation after death, it was considered as a will." And the court all held, that the instrument then under consideration, though called a deed, though in form a deed, was in its nature testamentary, and being attested by only two witnesses, could not pass the freehold estate contrary to the provisions of the Statute.

Again, delivery of a deed is as essential to pass an estate as the signing, and so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the deed. A deed may be signed by a third person by virtue of a power-of-attorney, duly executed, and so may it be delivered to a third person, to be delivered to the grantee. But the authority in such cases must be executed during the life of the grantor, otherwise it "availeth nothing," for no man can create an authority which shall survive him. After his decease the right "is forthwith in the heir." Lit. § 66; Willes, 105; Co. Lit. 52 b. There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. The depositary must have had such a dominion over the deed during the lifetime of the grantor as the latter could not interfere with, in order to have any control over it after his decease.

We think the instructions of the court below were correct; and that if the grantor, until her death, reserved the right to recall the deed from the hands of the depositary, there was no delivery.

The law of the case is not changed by treating this instrument as a deed of bargain and sale, or by way of covenant to stand seised for uses, as contended by the defendant's counsel. The Statute of Uses, 27 Henry VIII., has been adopted in this State, and a freehold estate *in futuro* may be thus conveyed. *French v. French*, 3 N. H. 234; *Bell v. Scammon*, 15 N. H. 381. This instrument may perhaps be regarded either as a deed of bargain and sale, or as a covenant to stand seised for uses. A bargain and sale requires a pecuniary consideration. 4 Cruise, 110; *Jackson v. Fiske*, 10 Johns. 456; and a conveyance to stand seised for uses requires the consideration of blood or marriage. 4 Cruise 120; 4 Kent's Com. 493; *Rex v. Scammonden*, 3 Term 474; *Underwood v. Campbell*, 14 N. H. 393. This instrument had expressed in it a small pecuniary consideration, and the evidence would seem also to show a sufficient relationship upon which to found a deed to stand seised for uses. But delivery is as essential to the valid operation of an instrument of this kind as to one conveying the estate immediately; and the jury having found that this deed was never delivered, a verdict for the plaintiff followed as a necessary consequence.

If the owner of land desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed; or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee. But if he wishes to retain the power of changing the disposition of the property at his pleasure, that can only be properly effected by will. So long as he retains the instrument, whether in the form of a deed or will, in his power, the property is his.

The motion in arrest of judgment cannot prevail. The count was sufficient after verdict.

The verdict having been returned for the plaintiff, and the rulings and instructions to which the defendant excepted having been sustained, it becomes unnecessary to consider the exceptions which were taken by the plaintiff, and there must be

*Judgment on the verdict.*¹

¹ See *Culver v. Carroll*, 175 Ala. 469; *Whittenbrock v. Cass*, 110 Cal. 1; *Kenney v. Parks*, 125 Cal. 146; *Wellborn v. Weaver*, 17 Ga. 267; *Stevens v. Stevens*, 256 Ill. 140; *Deitz v. Deitz*, 295 Ill. 552; *Osborne v. Eslinger*, 155 Ind. 351; *Kirby v. Hulette*, 174 Ky. 257; *Carey v. Dennis*, 13 Md. 1; *Taft v. Taft*, 59 Mich. 185; *Saltzsieder v. Saltzsieder*, 219 N. Y. 523; *Fortune v. Hunt*, 149 N. C. 358; *Huddleston v. Hardy*, 164 N. C. 210; *Campbell v. Thomas*, 42 Wis. 437; *Williams v. Daubner*, 103 Wis. 521; *Kittoe v. Willey*, 121 Wis. 548.

But compare *Lippold v. Lippold*, 112 Iowa 134; *Daggett v. Simonds*, 173 Mass. 340; *Worth v. Case*, 42 N. Y. 362; *Henry v. Phillips*, 105 Tex. 459:

SCHURTZ, ADMINISTRATOR v. COLVIN ET AL.

55 Ohio St. 274. 1896.

MINSHALL, J.¹ There can be no question but that James E. Colvin waived his lien as a vendor by taking a mortgage on the granted premises and other lands of the grantee, to secure the purchase money. Such is the settled law of this state. The court's conclusion of law as to this is correct, and not now questioned by the defendant in error. So that the only question here presented, is as to whether it erred in its second conclusion, that, upon the facts found, the mortgage of James E. Colvin, being subsequent in point of time, is superior in equity to the Schurtz mortgage. Priority is claimed on the ground that at the time the Schurtz mortgage was taken, James E. Colvin held the legal title to his interest in the premises, subject, however, to a legal obligation to convey to James Colvin as purchaser, on his paying the purchase money or securing it to be paid. If the facts found will bear this simple construction, then there can be no question as to the correctness of the court's conclusion of law thereon. In such case the legal title of James E. Colvin would have been notice to the world of his rights in the property; and no one could have acquired an interest in it superior to his by mortgage or otherwise. The question, however, is whether the facts as found will bear this construction as between James E. Colvin and the Schurtzs. James E. Colvin had by a verbal agreement made in 1884, sold his interest in the premises to James Colvin, who went into possession under the agreement and was in possession at the time the Schurtz loan was made. Some time before the making of the Schurtz mortgage, James E. Colvin with his cotenant, Silas H. Colvin, executed a deed for the land to James Colvin, the purchaser, and placed it in the hands of a third person, Howard Colvin, to be delivered when the purchase money was paid or secured by mortgage. Afterward, for the purpose of enabling James Colvin to obtain a loan of money on the land, Howard delivered the deed to him that he might obtain a description of the premises and exhibit it as evidence of his title. The facts found bear this construction and none other. It is true that from the facts found it was not to be regarded as delivered. But the law has always attached much importance to an overt act. It contravenes its spirit to allow that an act may be done with an intention contrary to the act itself. And whilst, as between parties, the intention may be shown, it seldom permits this to be done, where to do so would work a fraud on innocent third persons. Here, whilst James Colvin was in possession of the land and of a deed to it by James E. Colvin, of whom he had purchased, the Schurtzs, on

¹ The opinion only is printed.

the faith of these appearances, loaned him \$6,500, and took a mortgage on the land to secure its payment; and, as the court expressly finds, without any knowledge that the deed had ever been held as an *escrow* by any one, and that it was taken in good faith without any knowledge that James E. Colvin had or claimed any interest in or lien on the land.

It would seem on the plainest principles of justice, that under these circumstances James E. Colvin, as against the owner of the Schurtz mortgage, should not be heard to say that the deed had not in fact been delivered at the time the mortgage was made, and that his equity is superior to it. He trusted Howard with the deed to be delivered when the conditions had been performed. Howard violated his trust. He delivered it to the grantee that the latter might obtain a loan on the land by exhibiting it as evidence of his title. The loan was so obtained of persons who had no knowledge of the facts and were entirely innocent of any fraud in the matter. Who then should suffer the loss? It may be regarded as one of the settled maxims of the law, that where one of two innocent persons must suffer from the wrongful act of another, he must bear the loss who placed it in the power of the person as his agent to commit the wrong. Or, more tersely, he who trusts most ought to suffer most. And it would seem, that the rights of the parties in this case should be governed by this principle, unless there is some rigid exception established by the decisions [decisions?], which forbids its application where a deed is delivered in *escrow*.

Before considering this question, it may be well to note that no importance can be attached to the fact that the deed, on the faith of which the loan was made, had not yet been recorded. A deed on delivery passes title to the land whether recorded or not. It takes effect on delivery. The object of recording a deed is to give notice to third persons, not to perfect it as a muniment of title. Where not recorded it will be treated as a fraud against third persons dealing with the land without notice of its existence. Hence, the first deed, if delivered, having been duly executed, passed the title to James Colvin. Recording it would have added nothing to its effect as a deed; and the failure to record it in no way influenced the conduct of any of the parties to the suit.

There are some cases which seem to hold that, where a deed is delivered as an *escrow* to a third person to be delivered on the performance of certain conditions, no title passes if delivered without the conditions being performed; and that this is so as against an innocent purchaser from the vendee. *Everts v. Agnes*, 6 Wis. 463, is such a case. The argument there is that no title passes by deed without delivery; that where a deed is delivered by one who holds it as an *escrow*, contrary to the vendor's instructions, there is no delivery, and consequently an innocent purchaser acquires no title. To the objection that if this be true there is no safety for purchasers,

the court said that if it be not true, there is none for vendors. This seems to be a misconception of the real situation of the parties. A vendor may protect himself. He may either retain the deed until the vendee pays the money or select a faithful person to hold and deliver it according to his instructions. If he selects an unfaithful person, he should suffer the loss from a wrongful delivery, rather than an innocent purchaser without knowledge of the facts. In purchasing land, no one, in the absence of anything that might awaken suspicion, is required, by any rule of diligence to inquire of a person with whom he deals, whether his deed had been duly delivered. Where a deed is found in the grantee's hands, a delivery and acceptance is always presumed. *Wash. Real Property*, 5th Ed., 312, pl. 31. The fact that under any other rule "no purchaser is safe," had a controlling influence with the court in *Blight v. Schenck*, 10 Penna. St. 285, 292. In this case the question was whether a deed had been delivered, the defendant being an innocent purchaser from the vendee of the plaintiff. In discussing the case the court used this language: "Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor. If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority or may commit a wrong by acting knowingly contrary thereto." And the case was disposed of on this principle.

The case on which most reliance is placed by the defendant in error, is that of *Ogden v. Ogden*, 4 Ohio St. 182. The facts are somewhat complicated. It seems to have grown out of an agreement for an exchange of lots between two of the parties, each being the equitable owner of his lot. The deed for the lot of one of them, David Ogden, was to be delivered by the legal owner to the other on his performing certain conditions, and was delivered to a third person to be delivered on the performance of the conditions. It was delivered without the conditions being performed; and was then mortgaged by the grantee to the defendants, Watson and Stroh, who claimed to be innocent purchasers for value. But it was charged in the bill that they took their mortgages with notice and to cheat and defraud the complainant; and it does not distinctly appear whether this was true or not. From the reasoning of the court it would seem that the deed had been obtained from the party holding it in some surreptitious manner. It is first conceded "that if David reposed confidence in Gilbert, and he violated that confidence and delivered the deed, and loss is to fall on either David or the mortgagees, that David should sustain that loss, and not the innocent mortgagees." Instances are then given in which the rule would be otherwise — an innocent purchaser from the bailee of a horse, or of stolen property, or from one who had either stolen or surreptitiously obtained his

deed. There is no room for doubt in either of these cases. But the court then observes that. "If the owner of land makes a deed purporting to convey his land to any one, and such person by fraud or otherwise procures the owner to deliver the deed to him, a bona fide purchaser from such fraudulent grantee without notice of the fraud, might acquire title to the land." This, we think, is equally clear; but, unless the deed in the case had been stolen or surreptitiously obtained, or the mortgagees were guilty of the fraud charged, then, on the reasoning of the court, the decree should have been in their favor. If the case is to be understood as holding differently, then it is not in accord with the later decision in *Resor v. Railroad Company*, 17 Ohio St. 139. Here the owner of a tract of land contracted to sell it to the company, but refused to deliver the deed until paid. An agreement was then made by which the deed was placed in the hands of the president, but it was not to be considered delivered until payment had been complied with, and the company went into possession. The president wrongfully placed the deed on record, and the company then mortgaged its entire property to secure an issue of bonds. The court held the bond-owners to be innocent purchasers, and that the plaintiff was estopped from setting up his claim as against them. It might be claimed that the delivery by Resor was to the purchaser, the company; and that a deed cannot be delivered as an *escrow* to the vendee. The latter statement is true. But as a matter of fact it was delivered to the president of the company and not to the company itself. There is no reason why the president could not have held it as an *escrow*, and under the agreement, must be regarded as having so held it. *Railroad Co. v. Iliff*, 13 Ohio St. 235; *Watkins v. Nash*, L. R., 20 Eq., 262; *Ins. Co. v. Cole*, 4 Fla. 359. The plaintiff trusted the president to hold the deed, and it was his wrongful act that disappointed him.

The supreme court of Indiana is a well-considered case, *Quick v. Milligan*, 108 Ind. 419, the facts of which are very similar to the case before us, held that where a deed is delivered to a third person to be delivered the grantee, who is already in possession of the land, on payment of the purchase money, and is delivered without the condition being performed that the vendor is estopped as against an innocent purchaser to set up his title. See also, and to the same effect, the following cases: *Bailey v. Crim*, 9 Biss. 95; *Haven v. Kramer*, 41 Iowa 382; *Blight v. Schenck*, 10 Penna. St. 285.

It is the general, if not universal, rule of the courts, to protect the innocent purchaser of property for value, against such vices in the title of their vendors, as result from fraud practised by them in acquiring the property. For in all such cases the party complaining is found to have been guilty of some negligence in his dealings, or to have trusted some agent who has disappointed his confidence and is more to blame for the consequences than the innocent purchaser, so that his equity is inferior to that of such purchaser. Hence, it is,

that the innocent purchaser for value from a fraudulent grantee, is always protected in his title as against the equity of the wronged grantor. In *Hoffman v. Strohecker*, 7 Wats. 86, where a sale has been made under execution upon a satisfied judgment, the satisfaction not appearing of record, an innocent purchaser of the person who purchased at the sale was protected in his title, although the purchaser at the sale had knowledge of the facts, and acquired no title. A similar holding had been made by the same court in *Price v. Junkins*, 4 Wats. 85, and in *Fetterman v. Murphy*, Id. 424. In the case of *Price v. Junkins* it is said "An innocent purchaser of the legal title, without notice of trust or fraud is peculiarly protected in equity, and chancery never lends its aid to enforce a claim for the land against him."

Most of the cases cited and relied on by the defendant are not in point. Where the grantee wrongfully procures the holder of a deed as an *escrow* to deliver it to him, he acquires no title, or at least a voidable one; but this is a very different case from where a third person without notice, afterward and while the grantee is in possession, deals with him in good faith as owner. Again, it may be conceded that the delivery of a deed by one who simply holds it as a depository, transfers no title; but if he holds it as an *escrow*, with power to deliver it on certain conditions, a delivery, though wrongful, is not in excess of his authority for, in such case, the act is within his authority and binds the principal as against an innocent party. And so a deed held in *escrow*, delivered after the death of the principal, passes no title. It will readily appear, from reasons already given, that such cases are without application to the case under review. Here it will be conceded that as between the grantor and the grantee the latter took no title, because delivered by Howard contrary to his instruction. But the plaintiff relies on the fact that, as he had no knowledge that the deed had ever been held as an *escrow* and, in good faith, loaned his money and took a mortgage on the land to secure it; and that the defendant is therefore estopped from setting up his legal title as against him.

But it is claimed that, as the plaintiff relies on an estoppel, he should have pleaded it. This rule, however, only applies where the party has had an opportunity to do so. In this case he had none until the evidence had been introduced. The defendant, in his answer and cross-petition, set up that the deed from him had been placed in *escrow* and wrongfully delivered to the grantee and that the plaintiff had knowledge of the facts. The plaintiff then averred his want of any knowledge or belief as to the facts stated by the defendant and denied them. The court, however, found that the deed had been delivered to Howard Colvin to be held as an *escrow* and was by him wrongfully delivered to the grantee; but also found that the plaintiff was ignorant of the facts, and an innocent purchaser for value without notice. The object of pleading is to inform the oppo-

site party of the facts upon which the pleader relies as the ground of his claim or defence. And here, when the plaintiff denied knowledge of the facts as pleaded by the defendant, he fairly advised the defendant that he relied on an estoppel, on the ground of want of notice, should the facts as pleaded be made to appear in the evidence; for, that he was a purchaser for value appeared from his petition, which was taken as true as it was not controverted. Hence the claim of the plaintiff could in no way surprise the defendant unless he was ignorant of the law. The first opportunity the plaintiff had to plead an estoppel as against James E. Colvin, was when the facts were fully made to appear in evidence; and he is not therefore precluded from doing so on the facts as found by the court.

*Judgment reversed and judgment on the facts for plaintiff in error.*¹

652-665
v. Wickham

XENOS AND ANOTHER v. WICKHAM

L. R. 2 H. L. 296. 1866.

"THEN, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

"I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: 'I deliver this as my deed;' but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's Case*, 3 Co. Rep. 26, it is said: 'If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., there B.

¹ See *Baillarge v. Clark*, 145 Cal. 589; *Mays v. Shields*, 117 Ga. 814; *Quick v. Mulligan*, 108 Ind. 419; *Haven v. Kramer*, 41 Iowa 382; *Leonard v. Shale*, 266 Mo. 123.

By the weight of authority an innocent purchaser from the grantee is not protected. *Cobban v. Conklin*, 208 F. R. 231; *Smith v. South Royalton Bank*, 32 Vt. 341; and cases collected in Devlin, *Deeds*, 3d ed., § 322.

may refuse it *in pais*, and thereby the obligation will lose its force.' I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case*, by saying that C. must not be a servant of A., though, of course, that is very material in determining the question whether it was 'delivered to C., to B.'s use,' which I consider it to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B." — *Per* BLACKBURN, J., L. R. 2 H. L. 312.¹

BOYD v. SLAYBACK ET AL.

63 Cal. 493. 1883.

APPEAL from a judgment of the Superior Court of San Diego County.

The action was brought against Robert Taggart, a minor, and against O. M. Slayback, as administrator of the estate of Mary B. Taggart, and as guardian of Robert Taggart, to quiet title to certain lands alleged to have been sold to the plaintiff by Mary B. Taggart. The plaintiff alleged that some time subsequent to the execution and delivery of the deeds to him, by which the lands were conveyed, they were left at the residence of Mrs. Taggart in a tin box, and that after her death it was discovered that the deeds had been abstracted. The defendant denied the execution and delivery. The deeds were not recorded.

The other facts appear in the opinion of the court.

PER CURIAM.² The judgment must be reversed for error in the charge to the jury. The court below charged: "A grant, duly executed, is presumed to have been delivered; therefore, if you find from the evidence that Mrs. Taggart actually signed and acknowledged the deeds in question, the law will presume that they were duly delivered, and in order to defeat this presumption, the party disputing the delivery must show, by preponderance of proof, that there was no delivery."

¹ And see *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606; *Stephens v. Stephens*, 108 Ark. 53, 57; *Little v. Eaton*, 267 Ill. 623; *Moore v. Hazelton*, 9 All. (Mass.) 102; *Ruckman v. Ruckman*, 32 N. J. Eq. 259, 260; *Mitchell v. Ryan*, 3 Ohio St. 377; *Matson v. Johnson*, 48 Wash. 256; authorities collected in 1 Devlin, Deeds, 3d ed., § 262; 2 Tiffany, Real Prop., 2d ed., § 461.

But compare *Storey v. Storey*, 214 F. R. 973 (promissory notes); *Clark v. Creswell*, 112 Md. 339, 342; *Lynch v. Lynch*, 121 Miss. 752; *Rountree v. Rountree*, 85 S. C. 383.

² Part of the opinion relating to other points is omitted.

This was error. A deed takes effect only from the time of its delivery. Without delivery of a deed it is void. No title will pass without delivery. 23 Cal. 528; 30 Cal. 208; 32 Cal. 610. It is for the party claiming under a deed to prove its delivery. Sometimes slight evidence will be sufficient to support a finding of delivery, but no legal presumption of delivery arises from the mere fact that the instrument is "signed." The acknowledgment only proves that it was signed.

*Judgment reversed and cause remanded for a new trial.*¹

MAYNARD v. MAYNARD AND OTHERS

10 Mass. 456. 1813.

THIS was a writ of *entry sur disseisin*, brought to recover possession of a certain tract of land in Marlborough, wherein the demandant counts upon his own seisin within thirty years, and upon a disseisin by the tenants.

A trial was had upon the general issue, at the sittings in this county after the last October Term, before *Parker, J.*, who reports that the demandant's title is unquestioned, unless taken away by a certain deed, now cancelled, which purports to convey the same to his son, Abel Maynard, deceased, under whom the tenants claim to hold the same, the said Nancy being the widow, and the other tenants the children, of the said Abel.

The deed, which purports to have been made by the demandant, for the consideration of 2,000 dollars, and contains the usual covenants of warranty, was made under the following circumstances. In April, 1810, Hezekiah Maynard, the demandant, called upon Benjamin Rice, Esq., who is a subscribing witness to the execution of the deed, and the magistrate before whom it was acknowledged, and told him he wished to make some provision for his son Abel, and requested the witness to write a deed of the land, being part of the demandant's farm, which is described in the deed. This was done by the witness, who read it to the demandant, and he was satisfied with it. A few days afterwards, he called on the witness, and signed, sealed, and acknowledged the deed; and he requested the witness to take it to the register's office, and get it recorded. The witness carried it to the register accordingly, procured it to be recorded, and, in May following, received it back. The witness informed the demandant of this, who told him it was right, and requested him to keep the deed until it was called for. Abel, the son, was never present at any of these transactions, nor did it appear that he ever knew of the execution of the deed. About a year afterwards, Abel died, and, soon after he was buried, the demandant called upon the witness

¹ *Hawes v. Hawes*, 177 Ill. 409; *Anderson v. Anderson*, 126 Ind. 62; *Alexander v. de Kernel*, 81 Ky. 345, accord. See *Fisher v. Hall*, 41 N. Y. 416. Compare *Baker v. Hall*, 214 Ill. 364.

for the deed, which was given to him, he then saying that he supposed he had a right to do as he pleased with it; and then cut his name and seal from it. It was proved that Abel, the son, lived upon the farm with the demandant, his father, and carried it on with his labor, and supported his family upon it. It was also proved, by several witnesses, that the demandant, in conversation after the execution of the deed, considered the land as his son's property.

The judge instructed the jury that there were no facts proved in the case which, in law, could amount to a delivery of the deed to Abel; so that the conveyance was not perfect, and the demandant must recover possession. A verdict was accordingly returned for the demandant, which the tenants moved might be set aside, and a new trial be granted.

PER CURIAM. It is very clear that there was no delivery of this deed, so as to give it the effect of passing the estate from the demandant to his son, as whose widow and heirs the tenants claim. The act of registering a deed does not amount to a delivery of it; there not appearing any assent on the part of the son, or even any knowledge that the deed had been executed in his favor. A delivery of a deed duly executed and acknowledged, to the register of deeds, aided by a subsequent possession of the deed by the grantee, might be evidence of a delivery to him.

But the facts in the case at bar, testified by the person who acted as the scrivener and magistrate, leave no doubt of the intention of the grantor ultimately to pass this land to his son, but to keep the control over it until he should be more determined upon the subject. He may have chosen to place the deed, perfect as it was, except as to delivery, in the hands of the witness, in lieu of a devise, to operate after his decease; for nothing was wanting to its complete effect but to direct the witness to deliver it to his son after his own decease. He probably chose to consider it as revocable at all times by himself, in case of any important change in his family or estate. Whatever may have been his views, however, he retained an authority over it; and having reclaimed and cancelled it, the tenants can claim no title under it.

Whether a creditor of his son might not have taken it in satisfaction of a debt, in consequence of the credit given by putting such an apparent title upon record, and especially as the son was in actual possession of the premises, need not now be determined. We are satisfied that the title never passed out of the demandant, and that he is therefore entitled to a recovery. *Judgment on the verdict.*¹

¹ *Younge v. Guilbeau*, 3 Wall. (U. S.) 636; *Barnes v. Barnes*, 161 Mass. 381; *Hogadone v. Grange Mutual Fire Insurance Co.*, 133 Mich. 339; *McMahan v. Hensley*, 101 S. E. (N. C.) 210, accord. See *Rowley v. Rowley*, 197 S. W. (Mo.) 152; *Robbins v. Rascoe*, 120 N. C. 79; *Mitchell v. Ryan*, 3 Ohio St. 377; *King v. Antrim Lumber Co.*, 172 Pac. (Okl.) 958. Compare *Sellers v. Rike*, 292 Ill. 468; Massachusetts, Gen. Laws (1921), c. 183, § 5; *Jackson v. Phipps*, 12 Johns. (N. Y.) 418; *Smith v. South Royalton Bank*, 32 Vt. 341.

THOMPSON v. LEACH

3 Lev. 284; 2 Vent. 198. 1690.

EJECTMENT upon the demise of Charles Leach, and on *Not Guilty* and a special verdict, the case was thus: Simon¹ Leach being tenant for life, remainder to his first son in tail,² remainder to Sir Simon Leach in tail. Simon Leach makes a deed of surrender to Sir Simon before the birth of any son of Simon, and afterwards had a son, viz. Charles the lessor of the plaintiff. Simon keeps the deed of surrender in his hands, and Sir Simon had no knowledge of it until five years after the said son's birth. But as soon as he had notice of it, he accepted it, and entered on the lands; after which Simon dies, and Charles the son brings the ejectment: and whether the contingent remainder was destroyed by this surrender, was the question. And after divers arguments, POLLEXFEN, Chief-Justice, POWELL and ROKESBY, Justices, held, that the estate did not pass by the surrender until the acceptance of it; and for this they relied much on the constant form of pleading surrenders, wherein always the precedents are not only to plead the surrender, but also with an acceptance, viz., that the surrenderee agreed thereto, except one or two in *Rastal*; and divers other authorities were cited in the case *pro* and *con*, and that then the surrender not taking effect, nor the estate for life merged before the birth of the son, he had a good title. 2. The said three judges held, that the acceptance afterwards should not so relate to the making of the deed, as to cause the estate to pass *ab initio*, and so by relation to make it a surrender before the son's birth, so as to destroy his estate; for that would be to make a relation work to the prejudice of a third person, and relations do always make acts good only between the parties themselves, but not to prejudice strangers, as Co. 3 Rep., *Butler and Baker's Case*. But JUSTICE VENTRIS to the contrary held, that the estate vested immediately by the making the deed of surrender; but to be divested by the surrenderee's refusal to accept it afterwards, but that until such refusal the estate was in the surrenderee; and divers cases were cited on that side also: and he also held, that if it did not vest at the first by the delivery of the deed of surrender, yet by the acceptance afterwards it should be by relation a surrender from the beginning, and so destroy the contingent remainder to Charles the son born afterwards; and this relation does no wrong to a third person, for Charles was not a person *in esse* when the surrender was first made. But by the opinion of the other three judgment was

¹ Levinz calls him "Nicholas;" but the other reports show that his name was "Simon."

² The other reports show that the remainder was to the first and other sons in tail.

given for the plaintiff, upon which error was brought in B. R. and in Hill. 3 W. & M. the judgment given in C. B. was affirmed by the whole court. But afterwards the defendant brought error thereof in the House of Peers; and in December, 1692, on hearing of the judges there, they all continuing in their former opinion (except SIR ROBERT ATKINS, Chief Baron, and then Speaker of the House of Peers), the judgment was reversed by the Lords in Parliament, the said SIR ROBERT ATKINS and MR. JUSTICE VENTRIS concurring with them as before.

Levinz, of counsel for the defendant.

[The dissenting opinion of VENTRIS, J., in the Court of Common Pleas, which was afterwards adopted in the House of Lords, is thus given in his report of this case in 2 Vent. 198.]

Upon this record the case is no more than thus; Simon Leach, tenant for life, remainder to his first son, remainder in tail to Sir Simon Leach. Simon Leach before the birth of that son by deed, sealed and delivered to the use of Sir Simon (but in his absence and without his notice) surrenders his estate to Sir Simon, and continues the possession until after the birth of his son; and then Sir Simon Leach agrees to the surrender, whether this surrender shall be taken as a good and effectual surrender before the son born.

There are two points which have been spoken to in this case at the bar.

First, whether by the sealing of the deed of surrender the estate immediately passed to Sir Simon Leach; for then the contingent remainder could not vest in the after-born son, there being no estate left in Simon Leach his father to support it?

Secondly, whether after the assent of Sir Simon Leach, though it were given after the birth of the son, doth not so relate as to make it a surrender from the sealing of the deed, and thereby defeat the remainder which before such assent was vested in the son?

I think these points include all that is material in the case, and I shall speak to the second point, because I would rid it out of the case. For as to that point I conceive, that if it be admitted, that the estate for life continued in Simon Leach till the assent of Sir Simon, that the remainder being vested in Charles the second son before such assent, there can be no relation that shall divest it.

I do not go upon the general rule, that relations shall not do wrong to strangers.

'T is true, relations are fictions in law, which are always accompanied with equity.

But 't is as true, that there is sometimes loss and damage to third persons consequent upon them; but then 't is what the law calls *damnum absque injuria*, which is a known and stated difference in the law, as my Brother Pemberton urged it. But I think there needs nothing of that to be considered in this point.

But the reason which I go upon is, that the relation here, let it be never so strong, cannot hurt or disturb the remainder in Charles Leach in this case; for that the remainder is in him by a title antecedent and paramount to the deed of surrender, to which the assent of Sir Simon Leach relates, so that it plainly overreaches the relation.

If an estate in remainder, or otherwise, ariseth to one upon a contingency or a power reserved upon a fine or feoffment to uses, when the estate is once raised or vested it relates to the fine or feoffment, as if it were immediately limited thereupon, 1 Co. 133, 156. So this remainder, when vested in Charles, he is in immediately by the will, and out of danger of his remainder being divested by any act done since, as the surrender is.

I will put one case, I think full to this matter, and so dismiss this point.

It cannot be denied, but that there is as strong a relation upon a disagreement to an estate, as upon an agreement, where the estate was conveyed without the notice of him that afterwards agrees or disagrees; if the husband discontinues the wife's estate, and then the discontinuee conveys the estate back to the wife in the absence of the husband, who (as soon as he knows of it) disagrees to the estate, this shall not take away the remitter which the law brought upon the first taking the estate from the discontinuee. And so is Lit. cap. Remitter, Co. 11 Inst. 356 b. The true reason is, because she is in of a title paramount to the conveyance to which the disagreement relates, though that indeed was the foundation of the remitter, which by the disagreement might seem to be avoided. This therefore I take to be a stronger case than that at the bar; so that if there were no surrender before the birth of Charles the son, there can be none after by any construction of law; for that would be in avoidance of an estate settled by a title antecedent to such surrender, whereas relations are to avoid mesne acts; and I believe there can be no case put upon relations that go any further, and it would be against all reason if it should be otherwise.

But as to the first point, I am of opinion, that upon the making of the deed of surrender, the freehold and estate of Simon Leach did immediately vest in Sir Simon, before he had notice, or gave any express consent to it; and so it was a surrender before Charles was born, and then the contingent remainder could never vest in him, there being no particular estate to support it.

A surrender is a particular sort of conveyance that works by the common law. And it has been agreed, and I think I can make it plainly appear, that conveyances at the common law, do immediately (upon the execution of them on the grantor's part) divest the estate out of him, and put it in the party to whom such conveyance is made, though in his absence, or without his notice, till some disagreement to such estate appears. I speak of conveyances at the common

law; for I shall say nothing of conveyances that work upon the Statutes of Uses, or of conveyances by custom, as surrenders of copyholds, or the like, as being guided by the particular penning of Statutes, and by custom and usage, and matters altogether foreign to the case in question.

In conveyances that are by the common law, sometimes a deed is sufficient (and in surrenders sometimes words without a deed) without further circumstance or ceremony; and sometimes a further act is requisite to give them effect, as livery of seisin, attornment, and sometimes entry of the party, as in case of exchanges; and as well in those conveyances that require a deed only, as those which require some further act to perfect them, so soon as they are executed on the grantor's part, they immediately pass the estate. In case of a deed of feoffment to divers persons, and livery made to one feoffee in the absence of the rest, the estate vests in them all till dissent, 2 Leon. 23, *Mutton's Case*. And so 223, an estate made to a feme covert by livery, vests in her before any agreement of the husband, Co. 1 Inst. 356 a. So of a grant of a reversion after attornment of the lessee, passeth the freehold by the deed, Co. 1 Inst. 49 a, Lit. sect. 66. In case of a lease, the lessee hath right immediately to have the tenements by force of the lease. So in the case of limitation of remainders and of devises (which though a conveyance introduced by the Statute, yet operates according to the common law), the freehold passeth to the devisee before notice or assent. I do not cite authorities, which are plentiful enough in these matters, because they that have argued for the plaintiff have in a manner agreed, that in conveyances at the common law, generally the estate passeth to the party, till he divests it by some disagreement.

But 't is objected, that in case of surrenders, an express assent of the surrenderee is a circumstance requisite; as attornment to a grant of a reversion, livery to a feoffment, or execution by entry, in case of an exchange.

To which I answer, that an assent is not only a circumstance, but 't is essential to all conveyances; for they are contracts, *actus contra actum*, which necessarily suppose the assent of all parties: but this is not at all to be compared with such collateral acts or circumstances, that by the positive law are made the effectual parts of a conveyance; as attornment, livery, or the like; for the assent of the party that takes, is implied in all conveyances, and this is by intendment of law, which is as strong as the expression of the party, till the contrary appears; *stabit præsumptio donec probetur in contrarium*.

But to make this thing clear, my Lord Coke in his first Institutes, fol. 50, where he gives instances of conveyances that work without livery, or further circumstance or ceremony, puts the cases of lease and release, confirmation, devise and surrenders, amongst the rest;

whereas if an express assent of the surrenderee were a circumstance to make it effectual, sure he would have mentioned it, and not marshalled it with such conveyances as I have shown before, need no such assent, nor anything further than a deed.

The case of exchanges has been put as an instance of a conveyance at law, that doth not work immediately; but that can't be compared to the case in question, but stands upon its particular reasons; for there must be a mutual express consent, because in exchanges there must be a reciprocal grant, as appears by Littleton.

Having, I hope, made out (and much more might have been added, but that I find it has been agreed) that conveyances work immediately upon the execution of them on the part of him that makes them, I will now endeavor to show the reasons, why they do so immediately vest the estate in the party without any express consent; and to show that these reasons do hold as strongly in case of surrenders, as of any other conveyances at law; and then consider the inconveniences and ill consequences that have been objected, would ensue, if surrenders should operate without an express consent; and to show, that the same are to be objected as to all other conveyances, and that very odd consequences and inconveniences would follow, if surrenders should be ineffectual till an express consent of the surrenderee; and then shall endeavor to answer the arguments that have been made on the other side, from the putting of cases of surrenders in the books, which are generally mentioned, to be with mutual assent, and from the manner of pleading of surrenders.

The reasons why conveyances do divest the estate out of the grantor, before any express assent or perhaps notice of the grantee, I conceive to be these three:—

First, because there is a strong intendment of law, that for a man to take an estate it is for his benefit, and no man can be supposed to be unwilling to that which is for his advantage. 1 Rep. 44. Where an act is done for a man's benefit an agreement is implied, till there be a disagreement. This does not hold only in conveyances, but in the gift of goods, 3 Co. 26. A grant of goods vests the property in the grantee before notice. So of things in action; a bond is sealed and delivered to a man's use, who dies before notice, his executors may bring an action. Dyer, 167. An estate made to a feme covert, vests in her immediately, till the husband disagrees. So is my Lord Hobart, 204, in *Swain and Holman's Case*. Now is there not the same presumption and appearance of benefit to him in reversion in case of a surrender? Is it not a palpable advantage to him to determine the particular estate, and to reduce his estate into possession? and therefore, why should not his assent be implied, as well as in other conveyances?

Secondly, a second reason is, because it would seem incongruous and absurd, that when a conveyance is completely executed on the grantor's part, yet notwithstanding the estate should continue in him. The words of my Lord Coke (1 Inst. 217 a) are, that it

cannot stand with any reason, "that a freehold should remain in a man against his own livery when there is a person able to take it." There needs only a capacity to take, his will to take is intended. Why should it not seem as unreasonable, that the estate should remain in Simon Leach, against his own deed of surrender? For in case of a surrender, a deed, and sometimes words without a deed, are as effectual as a livery in case of a feoffment.

Thirdly, the third and principal reason, as I take it, why the law will not suffer the operation of a conveyance to be in suspense, and to expect the agreement of the party to whom 't was made, is to prevent the uncertainty of the freehold. This I take to be the great reason why a freehold cannot be granted *in futuro*, because that it would be very hard and inconvenient that a man should be driven to bring his *præcipe* or real action first against the grantor, and after he had proceeded in it a considerable time, it should abate by the transferring the freehold to a stranger, by reason of his agreement to some conveyance made before the writ brought; for otherwise there is nothing in the nature of the thing against conveying a freehold *in futuro*; for a rent *de novo* may be so granted; because that being newly created, there can be no precedent right to bring any real action for it. Palmer, 29, 30.

Now in this case, suppose a *præcipe* had been brought against Simon Leach, this should have proceeded, and he could not have pleaded in abatement till Sir Simon Leach had assented; and after a long progress in the suit, he might have pleaded, that Sir Simon Leach assented *puis darrein* continuance, and defeated all. So that the same inconvenience, as to the bringing of real actions, holds in surrenders, as in other conveyances.

And to show that it is not a slight matter, but what the law much considers, and is very careful to have the freehold fixed, and will never suffer it to be in abeyance, or under such uncertainty, as a stranger that demands right should not know where to fix his action.

A multitude of cases might be cited; but I will cite only a case put 1 H. 6, 2 a, because it seems something of a singular nature, lord and villain, mortgagor and mortgagee, may be both made tenants.

But it will be said here, that if a *præcipe* had been brought against Sir Simon Leach, might not he have pleaded his disagreement, and so abated the writ by non-tenure?

'T is true; but that inconvenience had been no more than in all other cases, a plea of non-tenure, and it must have abated immediately; for he could not have abated it by any dissent after he had answered to the writ. Whereas I have shown it in the other case, it may be after a long progress in the suit.

Again, it's very improbable that he should dissent; whereas on the other side, an assent is the likeliest thing in the world; so the mischief to the demandant is not near so great, nor the hundredth part so probable.

Now I come to consider those inconveniences that have been urged that would ensue, if a surrender should work immediately.

It has been said, that a tenant for life might make such deed of surrender, and continue in possession, and suffer a recovery; and this might destroy a great many recoveries, and overthrow marriage settlements, and defeat charges and securities upon his estate after such deed of surrender.

These, and a great many more such like mischiefs, may be instanced in surrenders; but they hold no less in any other conveyance, whereby a man may (as has been showed before) divest himself of the estate, and yet continue the possession; and in this case the assent of the surrenderee, though he doth not enter, would (as it is agreed of all hands) vest the estate in him, Hutton 95, Br. tit. Surrender 50, though he cannot have trespass before entry, and that assent might be kept as private, and let in all the mischiefs before mentioned as if no such assent were necessary.

And this I think sufficient to answer to the inconveniences objected on that side.

Now let us see what inconveniences and odd consequences would follow, in case a surrender could not operate till the express assent of the surrenderee, then no surrender could be to an infant at least, when under the age of discretion; for if it be a necessary circumstance, it cannot be dispensed with no more than livery or attornment. So though an infant of a year old is capable to take an estate, because for his benefit he could not take a particular estate, upon which he had a reversion immediately expectant, because it must inure by surrender. If there be joint tenants in reversion, a surrender to one of them inures to both, 1 Inst. 192, 214 a, so there, as to one moiety, it operates without assent or notice.

Suppose tenant for life should make livery upon a grant of his estate to him in reversion and two others, and the livery is made to the other two in the absence, and without the notice of him in reversion, should the livery not work immediately for a third part of the estate? And if it doth, it must inure as a surrender for a third part. So is Bro. tit. Surrender, and 3 Co. 76.

If tenant for life should by lease and release convey the lands held by him for life, together with other lands to him in reversion who knows nothing of the sealing of the deed; should this pass the other lands presently, and the lands held for life not till after an express assent, because as to those lands it must work as a surrender? Plainly an express assent is not necessary. For if the grantee enters, this is sufficient.

I come in the last place to answer those arguments that have been made from the manner of putting the case of surrenders in the book, and the form of pleading surrenders, Co. 1 Inst. 337 b.

First, a surrender is a yielding up of the estate, which drowns by mutual agreement between them. Tenant for life, by agreement of him in reversion, surrenders to him; he hath a freehold before he enters. And so Perkins, in putting the case of a surrender, mentions an agreement; and divers other books have been cited to the same purpose.

To all which I answer:

No doubt but an agreement is necessary. But the question is, whether an agreement is not intended where a deed of surrender is made in the absence of him in the reversion; whether the law shall not suppose an assent, till a disagreement appears?

Indeed, if he were present, he must agree or disagree immediately; and so 't is in all other conveyances. The cases put in Perkins, sect. 607, 608, 609, are all of surrenders made to the lessor in person; for thus he puts them: The lessee comes to the lessor, and the lessee saith to the lessor, I surrender, saith he, if the lessor doth not agree, 't is void; *Car il ne poit surrender à luy maugre son dents*. And that is certainly so in surrenders, and all other conveyances; for a man cannot have an estate put into him in spite of his teeth.

But I cannot find any of the books cited that come to this point, that where a deed of surrender is executed without the notice of him in reversion, that it shall pass nothing till he consents; so that it cannot be said, that there is any express authority in the case.

Now, as to the form of pleading of a surrender it has been objected, that a surrender is always pleaded with acceptance; and many cases have been cited of such pleadings, Rastal's Entries 176, 177, Fitzh. tit. Barre 262, which are cases in actions of debt for rent, and the defendant in bar pleads, that he surrendered before the rent grew due, and shows, that the plaintiff accepted the surrender. So in waste brought, a surrender pleaded with the agreement of the plaintiff.

These and the like cases have been very materially, and I think fully answered at the bar by my Brother Pemberton; that those actions being in disaffirmance of the surrender, and implying a disagreement, the defendant had no way to bar or avoid such disagreement, but by showing an express agreement before.

The case of *Peto and Pemberton* in the 3 Cro. 101, that has been so often cited, is of the same sort: in a replevin the avowry was for a rent-charge; in bar of which 't is pleaded, that the plaintiff demised the land out of which the rent issued, to the avowant. The avowant replies, that he surrendered *dimissionem prædict*, to which the plaintiff agreed. This is the same with pleading in bar to an action of debt for rent: but when the action is in pursuance of the surrender, then it is not pleaded.

So is Rast. Entries 136. The lessee brought an action of covenant against the lessor, for entering upon him, and ousting of him. The

defendant pleads a surrender in bar, and that without any agreement or acceptance.

In Fitzherbert, tit. Debt 149, where the case is in an action of debt for rent; the defendant pleaded in bar, that he surrendered, by force of which the plaintiff became seised; there is no mention of pleading any agreement, notwithstanding that the action was in disaffirmance of the surrender.

Therefore, as to the argument which has been drawn against the form of pleading, I say, that if an agreement be necessary to be pleaded: then, I say,

First, that 't is answered by an implied assent, as well as an express assent. I would put the case; suppose a lessee for life should make a lease for years, reserving rent; and in debt for the rent the lessee should plead, that the plaintiff before the rent grew due surrendered to him in reversion, and he accepted it, and issue is upon the acceptance; and at the trial it is proved, that the plaintiff had executed a deed of surrender (as in this case) to him in reversion in his absence; would not this turn the proof upon the plaintiff, that he in reversion disagreed to this surrender? For surely his agreement is *prima facie* presumed, and then the rule is, *stabit præsumptio donec probetur in contrarium*.

Again, I say it appears by the cases cited that it is not always pleaded, and when pleaded 't is upon a special reason, as I have shown before, *i. e.*, to conclude the party from disagreeing; and it would be very hard to prove in reason, that an agreement (admitting an express assent to be necessary) must be pleaded; for if it were a necessary circumstance to the conveyance, why then 't is implied in pleading *sursum reddidit*; for it cannot be a surrender without it.

In pleading of a feoffment it is enough to say *feoffavit*, for that implies livery; for it cannot be a feoffment without it.

Now why should not *sursum reddidit* imply all necessary requisites, as well as *feoffavit*? and therefore I do not see that any great argument can be drawn from the pleading. For,

1. It is not always to be pleaded.

2. It cannot be made out to be necessary so to plead it; for if assent be a necessary requisite, then 't is implied by saying *sursum reddidit*, as livery is in *feoffavit*; and then to add the words of express consent is as superfluous, as to show livery after saying *feoffavit*.

And again, if it were always necessary, it is sufficiently answered by an assent intended in law; for presumptions of law stand as strong till the contrary appears, as an express declaration of the party.¹

¹ *Peavey v. Tilton*, 18 N. H. 151, *accord*.

In *Standing v. Bowring*, L. R. 31 Ch. D. 282, HALSBURY, LORD CHANCELLOR, said, p. 286: "If the matter were to be discussed now for the first time, I think it might well be doubted whether the assent of the donee was not a preliminary to the actual passing of the property. You certainly cannot

make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation. That is a matter which was settled by authorities which were not called to our attention in the course of the argument. In *Butler and Baker's Case*, 3 Rep. 26 b, it is said: 'The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested.' That case was decided in the year 1590. Exactly 100 years afterwards, in *Thompson v. Leach*, 2 Vent. 198, the question again arose, and was decided by the Queen's Bench against the opinion of *Ventris, J.* But that opinion so given was reversed afterwards by the House of Lords on a writ of error, 2 Vent. 208, and that was a very strong case indeed, because the effect of the surrender was to bar a contingent remainder, which would otherwise have become vested by the birth of the son, which happened before the assent of the surrenderee. In *Siggers v. Evans*, 1855, 5 E. & B. 367, the old authorities are reviewed, and Lord Campbell formulated the principle which I have indicated above."

COTTON, L. J., said p. 288: "Now, I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it.' When informed of it he may repudiate it, but it vests in him until he so repudiates it. *Siggers v. Evans*, 5 E. & B. 367, referred to by the Lord Chancellor, is a late case to that effect, in which the earlier authorities are reviewed, and one very remarkable case, *Smith v. Wheeler*, 1 Vent. 128, is quoted at p. 382, and also at greater length in *Small v. Marwood*, 9 B. & C. 300, 306, where the right of the Crown was defeated by an assignment made before that right accrued, but not communicated to the assignee until after that right had accrued. It was held that although the assignee knew nothing of the assignment, it became effectual at once, so as to defeat the title of the Crown, which accrued before the knowledge was communicated to the assignee, and therefore of course before acceptance by the assignee."

See *Mallott v. Wilson*, L. R. [1903], 2 Ch. 494.

Contra, *Bank of Healdsburg v. Bailache*, 65 Cal. 327; *Moore v. Flynn*, 135 Ill. 74; *Woodbury v. Fisher*, 20 Ind. 387; *Day v. Griffith*, 15 Iowa 104; *Simpson v. Yocum*, 172 Ky. 449; *Meigs v. Dexter*, 172 Mass. 217; *Couch v. Addy*, 35 Okl. 355; *Tuttle v. Turner*, 28 Tex. 759; *Welch v. Sackett*, 12 Wis. 243.

But see *Merrills v. Swift*, 18 Conn. 257; *Tibbals v. Jacobs*, 31 Conn. 428; *Jones v. Swayze*, 42 N. J. L. 279; *Wilt v. Franklin*, 1 Binn. (Pa.) 502; *Larisey v. Larisey*, 93 S. C. 450; 2 Tiffany, Real Prop., 2d ed., § 463.

Compare *Midkiff v. Colton*, 242 F. R. 373; *Hibberd v. Smith*, 67 Cal. 547; *Rittmaster v. Brisbane*, 19 Colo. 371; *Sellers v. Rike*, 292 Ill. 468; *Greene v. Conant*, 151 Mass. 223; *Blackwell v. Blackwell*, 196 Mass. 186; *Derry Bank v. Webster*, 44 N. H. 264; *Siggers v. Evans*, 5 E. & B. 367.

As to acceptance by grantees under a disability, see *Eastham v. Powell*, 51 Ark. 530; *Hayes v. Boylan*, 141 Ill. 400; *Palmer v. Palmer*, 62 Iowa 204; *Hall v. Hall*, 107 Mo. 101; *Davis v. Garrett*, 91 Tenn. 147.

THE CANCELLATION OF DEEDS. The cancellation of a deed does not destroy the estate created by it. *Campbell v. Jones*, 52 Ark. 493; *Ward v. Lumley*, 5 H. & N. 87. But where the grantee has voluntarily destroyed or surrendered his deed, he will not ordinarily be allowed to give parol evidence of its contents. See *Farrar v. Farrar*, 4 N. H. 191. Compare *Bank of Newbury v. Eastman*, 44 N. H. 431.

As to the effect of the Registry Acts on the cancellation of deeds, see *Commonwealth v. Dudley*, 10 Mass. 403; *Holbrook v. Tirrell*, 9 Pick. (Mass.) 105; *Lawrence v. Stratton*, 6 Cush. (Mass.) 163.

CHAPTER XI

REGISTRATION

SECTION I

STATUTES

St. 7 ANNE, c. 20 (1708). Whereas by the different and secret ways of conveying lands, tenements, and hereditaments, such as are ill disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons (who through many years industry in their trades and employments, and by great frugality, have been enabled to purchase lands, or to lend moneys on land security) have been undone in their purchases and mortgages, by prior and secret conveyances, and fraudulent encumbrances, and not only themselves, but their whole families thereby utterly ruined: for remedy whereof, may it please your most excellent Majesty (at the humble request of the justices of the peace, gentlemen, and freeholders of the county of Middlesex) that it may be enacted, and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, That a memorial of all deeds and conveyances, which from and after the twenty-ninth day of September, in the year of our Lord one thousand seven hundred and nine, shall be made and executed, and of all wills and devises in writing made or to be made and published, where the devisor or testatrix shall die after the said twenty-ninth day of September, of or concerning, and whereby any honors, manors, lands, tenements, or hereditaments in the said county, may be any way affected in law or equity, may be registered in such manner as is hereinafter directed; and that every such deed or conveyance that shall at any time after the said twenty-ninth day of September, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim; and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered at such times and in manner as is hereinafter directed.

. . . XVII. Provided always, and be it further enacted, That this Act shall not extend to any copyhold estates, or to any leases at a rack rent, or to any lease not exceeding one and twenty years,

where the actual possession and occupation goeth along with the lease, or to any of the chambers in Serjeants Inn, the inns of court, or inns of Chancery; anything in this Act contained to the contrary thereof in any wise notwithstanding.

ILLINOIS, ANNOT. STATS. (1913), § 2260. Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this State, shall be recorded in the county in which such real estate is situated; but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes.

§ 2262. All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors¹ and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.

§ 2263. Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof.

MASSACHUSETTS, GENERAL LAWS (1921), c. 183, § 4. A conveyance of an estate in fee simple, fee tail or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it, or an office copy as provided in section thirteen of chapter thirty-six, is recorded in the registry of deeds for the county or district in which the land to which it relates lies.

§ 29. No deed shall be recorded unless a certificate of its acknowledgment or of the proof of its due execution, made as hereinafter provided, is endorsed upon or annexed to it, and such certificate shall be recorded at length with the deed to which it relates; but this section shall not apply to conveyances from the United States.

NEW YORK, CONSOL. LAWS (1909), Real Property Law, § 291. A conveyance² of real property,³ within the state, on being duly

¹ See 13 Col. L. Rev. 539.

² See § 290 (3); *Decker v. Boice*, 83 N. Y. 215. Compare *Hull v. Diehl*, 21 Mont. 71.

³ The term "real property," as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years. § 290 (1).

acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

§ 292. Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

§ 315. Different sets of books must be provided by the recording officer of each county, for the recording of deeds and mortgages; in one of which sets he must record all conveyances and other instruments absolute in their terms delivered to him, pursuant to law, to be so recorded, which are not intended as mortgages, or securities in the nature of mortgages, and in the other set, such mortgages and securities delivered to him.

§ 320. A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time.

PENNSYLVANIA, St. May 28, 1715, § 8 (Pa. St. 1920, § 8842). No deed or mortgage, or defeasible deed, in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged or proved and recorded within six months after the date thereof, where such lands lie, as hereinbefore directed for other deeds.¹

St. March 18, 1775, § 1, as amended by St. May 19, 1893, P. L. 108 (Pa. St. 1920, § 8822). All deeds and conveyances, which, from and after the passage of this act, shall be made and executed within this Commonwealth of or concerning any lands, tenements or hereditaments in this Commonwealth, or whereby the title to the same may be in any way affected in law or equity, shall be acknowledged by the grantor, or grantors, bargainor, or bargainors, or proved

¹ See *Heister v. Fortner*, 2 Bin. (Pa.) 40, 43; *Friedley v. Hamilton*, 17 S. & R. (Pa.) 70; *Russell's Appeal*, post, p. 670.

by one or more of the subscribing witnesses thereto before one of the judges of the supreme court, or before one of the judges of the court of common pleas, or recorder of deeds, prothonotary, or clerk of any court of record, justice of the peace or notary public of the county wherein said conveyed lands lie,¹ and shall be recorded in the office for the recording of deeds where such lands, tenements or hereditaments are lying and being, within ninety days after the execution of such deeds or conveyance, and every such deed and conveyance that shall at any time after the passage of this act be made and executed in this Commonwealth, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent, and void against any subsequent purchaser or mortgagee for a valid consideration, or any creditor¹ of the grantor or bargainor, in said deed of conveyance, and all deeds or conveyances that may have been made and executed prior to the passage of this act, having been duly proved and acknowledged as now directed by law, which shall not be recorded in the office for recording of deeds in the county where said lands and tenements and hereditaments are lying and being, within ninety days after the date of the passage of this act, shall be adjudged fraudulent, and void as to any subsequent purchaser for a valid consideration, or mortgagee, or creditor¹ of the grantor, or bargainor therein.²

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notes.

ST. March 28, 1820, § 1, as amended by St. May 28, 1915, P. L. 631, § 1 (Pa. St. 1920 § 8845). All mortgages or defeasible deeds, in the nature of mortgages, made or to be made or executed for any lands, tenements, or hereditaments within this Commonwealth, shall have priority according to the date of recording the same, without regard to the time of making or executing such deeds; and it shall be the duty of the recorder to indorse the time upon the mortgages or defeasible deeds when left for record, and to number the same according to the time they are left for record; and, if two or more are left upon the same day, they shall have priority according to the time they are left at the office for record. No mortgage or defeasible deed, in the nature of a mortgage, shall be a lien until such mortgage or defeasible deed shall have been recorded, or left for record as aforesaid. No mortgage given by purchaser to seller, for any part of the purchase money of the land so mortgaged, shall be affected by the passage of this act, if the same be recorded within thirty days from the execution thereof.

¹ See *Davey v. Ruffell*, 162 Pa. 443; *Beman Thomas Co. v. White*, 112 Atl. (Pa.) 37.

² § 2 provides that deeds made out of the Commonwealth shall be recorded within six months.

See *Smith v. Young*, 259 Pa. 367.

SECTION II

REGISTRATION AS NOTICE

BEDFORD *v.* BACKHOUSE

2 Eq. Cas. Ab. 615, pl. 12. 1730.

A. LENT money on a mortgage of lands in Middlesex, and the mortgage was duly registered. Afterwards B. lent money on the same security, and his mortgage was registered. Then A. advanced a farther sum upon the same lands, without notice of the second mortgage. And it was held by LORD CHANCELLOR KING that the registry of the second mortgage was not constructive notice to the first mortgagee before his advancement of the latter sum, for though the Statute avoids deeds not registered as against *purchasers*, yet it gives no greater efficacy to deeds that are registered than they had before; and the constant rule of equity is, that if a *first* mortgagee lends a farther sum of money *without* notice of a second mortgage, his whole money shall be paid in the first place.¹

RUSSELL'S APPEAL

15 Pa. 319. 1850.

THIS was an appeal from the decree of the Court of Common Pleas of Wayne County, making distribution of the proceeds of sale of real estate, sold at sheriff's sale as the property of H. D. Roberts.

Roberts, the defendant in the several judgments, and from the sale of whose real estate by the sheriff arose the moneys in controversy, purchased said real estate on the 11th day of April, 1846, of Caleb Dunn, by articles of agreement under seal, for the sum of \$800. On the 1st day of May, 1847, Roberts had paid \$463 on said contract. On the 1st day of December, 1848, there was a balance due and unpaid on said contract of \$412.

On the 5th day of July, 1848, Roberts made the following assignment on the back of said contract, viz.:—

"For value received, I hereby assign all my right, and title, and interest in and to the above contract, to Stone & Graves and Moore and Graves, as collateral security for the amount due them, either on book, or note, or otherwise, said amount to be ascertained hereafter as soon as practicable. H. D. ROBERTS.

"DAMASCUS, *July 5th*, 1848."

H. D. Roberts took possession of the premises under the article of agreement, April 11th, 1846, and continued in possession and was in

¹ See *Morecock v. Dickens*, Amb. 678.

possession on the 30th day of November, 1849, the day of the hearing before the auditor.

On the 19th day of August, 1848, A. H. Russell obtained a judgment against said H. D. Roberts in the Court of Common Pleas of Wayne County, entered to No. 207, September Term 1848, for the sum of \$275. Interest from same date, and which judgment, with the interest and costs thereon, amounted to \$324.88 $\frac{3}{4}$, on the day said real estate was sold.

On the 9th day of September, 1848, John McGowan obtained a judgment in same court against H. D. Roberts, entered to No. 265, same term, for the sum of \$156.99. Interest from same day.

On the 1st day of December, 1848, the contract was given up to Graves, absolutely, by parol agreement. Same day, Caleb Dunn and wife conveyed by deed said land to C. C. Graves: consideration mentioned in deed, \$900.

December 4th, 1848, C. C. Graves and wife conveyed by deed same land to H. D. Roberts, consideration mentioned in deed, \$900. Same day Roberts gave Graves a judgment for \$800, which was entered same day to No. 102, December Term 1848, which, with interest and cost, amounted to \$837.42 on the day said real estate was sold. The note on which this judgment was entered, among other things, stated, "it being for the purchase-money of real estate."

On the 13th day of August, 1849, the sheriff sold said real estate as the property of H. D. Roberts, to C. C. Graves, for the sum of \$865, on a *venditioni exponas* issued on the judgment of *A. H. Russell v. H. D. Roberts*.

An auditor was appointed by said court to distribute said moneys. Graves, Russell, and McGowan, in person or by attorney, appeared before the auditor and severally claimed the amount of their judgments out of said moneys.

The auditor applied \$837.42 of said moneys to the payment in full of C. C. Graves's judgment, and \$3.71 to Russell's, and balance to auditor's fees.

A. H. Russell and John McGowan excepted to the report, and claimed the amount of their several judgments from said moneys — McGowan claiming to come in upon said fund after Russell.

The court confirmed the auditor's report.

Exception was taken to the decree of confirmation and application of the money in dispute.

The opinion of the court was delivered March 24, 1851, by

COULTER, J. Roberts, the defendant, as whose estate the land was sold, purchased it by articles of agreement, dated 11th April, 1846, for \$800, of which he paid \$463, went into possession, and remained in possession until the sale and distribution of the money below. Roberts became embarrassed with debts, and on the 5th July, 1848, he executed to Stone & Graves and Graves & Moore an assignment of the contract with Dunn under which he held the land, and all his

right and title thereby acquired, as collateral security for the amount due them.

This assignment was never recorded, and Roberts still remained in possession. On the 19th August, 1848, after the unrecorded assignment, Russell obtained his judgment, and on the 9th September following, McGowan obtained his judgment. These two judgments claim the money produced by the sale, according to their priority. But on the 1st December, 1848, Roberts, by parol, surrendered the land to Graves, one of the assignees; and on the same day, Dunn and wife conveyed to C. C. Graves, consideration mentioned in deed, \$900. On the 4th December, 1848, Graves and wife conveyed to H. D. Roberts, the defendant, who gave a judgment note to Graves for \$800, which was immediately entered up.

To this last judgment the court below awarded the whole money made by the sale on Russell's judgment. It was contended by Russell and McGowan that they were entitled to the whole fund, because the note given by Roberts falsely and fraudulently recited that it was for the purchase-money. But it is well enough to deliver the case at once from this argument, because these judgments could only bind the equity, if it bound anything, which was in Roberts at the time they were obtained, that is, after the assignment to Graves & Moore. The stream cannot rise above the fountain. And the balance of purchase-money then due was a previous, valid, subsisting lien. The shuffling between Dunn, Roberts, and Graves cannot give to Russell and McGowan more than they were entitled to, nor deprive Dunn or his representative of that to which he had a lawful claim.

The real question then is, whether the judgments of Russell and McGowan bound the equity which Roberts had in the land at the time of the assignment to Graves & Moore? And that will depend upon the effect of that assignment. It was not an absolute sale or transfer of the equity, because it is expressed on its face to be a collateral security for the payment of a debt. It was, therefore, at most, nothing more than a mortgage. Even, although a conveyance be absolute in its terms, if it is intended by the parties to be a mere security for the payment of a debt, it is a mortgage: 6 Watts, 409, *Keene v. Gilmore*; and *Clark v. Henry*, 2 Cowen, 324; 7 Johnson's Chancery, 40, *Henry v. Davis*. Roberts still continued the debtor of Graves & Moore. The debt was not extinguished; it was, therefore, a mortgage. Nor has the writing the distinctive marks of a conditional sale, for the same reason, to wit, that the original debt was by the face of the papers still subsisting. But it was never recorded, and, therefore, must be postponed to a subsequent judgment: *Jacques v. Weeks*, 7 Watts, 261; and 17 Ser. & R. 70; and Statute 28th March, 1820, Dunlop, p. 354, second edition. It is contended, however, that the contract for the conveyance of the land to Roberts was but a chose in action, and that the assignment

passed the title, without the necessity of recording; that it is not within the recording Acts; and *Craft v. Webster*, 4 Rawle, and *Mott v. Clark*, 9 Barr, were cited. But these cases do not carry the defendant in error through. An article of agreement for the sale of land, accompanied by delivery of possession and payment of part of the purchase-money, is much more than a chose in action; it is an abiding interest in the land itself. It may be bound by judgment; is the subject of judicial sale, not as a chattel, but as an interest in the land. In the early history of Pennsylvania, improvement rights were considered as chattels. But that time has long passed, and pre-emption or inchoate interests are bound by judgments and sold, because every interest arising out of real estate, equitable as well as legal, is considered as an interest in the land. Thousands of acres are held in this commonwealth by location and survey only. It would sound strangely to a lawyer of the interior to say that these interests were not real estate, and the transfer or encumbrance of them not subject to the recording laws. Such a doctrine would upset estates and change the accepted principles of the commonwealth. They have from ancient time been dealt with by the people as interest in real estate, like other equitable interests in land; and, being the subject of contract and sale as such, there is the same reason for their being subject to the recording Acts as the legal title. The experienced and learned counsel states that he has been unable to find any reported case in which such equities were adjudged to be the subject of the recording Acts. But it may never before have been drawn in question. I know very well, and I think every practitioner is acquainted with the fact, that mortgages are often given upon equitable estates, and that equitable estates are often the subject of bargain and sale; and I may say, that I don't recollect to have seen it contended in any case that the recording Acts applied only to strictly legal titles, or that judgments were liens or attached only upon legal estates. The subsequent judgments, therefore, became liens at the time of their entry upon the equitable interest of Roberts, the assignment to Graves & Moore being merely a mortgage or security for a debt, and therefore, not being recorded, must give way to the subsequent judgments.

The decree is therefore reversed, and it is modified, so as to award to the legal title, or those representing it, so much of the money or fund in court as was due for balance of purchase-money by Roberts at the time Russell obtained his judgment; and the residue is awarded to Russell's judgment, unless the residue will more than satisfy it; and, in such case, what remains is awarded to McGowan's judgment.

The record is remitted to the court below for the purpose of carrying out this modified decree.¹

¹ Compare *Mesick v. Sunderland*, 6 Cal. 297; *Salisbury v. La Fitte*, 57 Colo. 358; *Walker v. Walker*, 198 Pac. (Colo.) 432; *Richards v. Potter*, 124

GRAVES v. GRAVES

6 Gray (Mass.) 391. 1856.

Writ of entry to recover a tract of land in Whately and Deerfield. Plea, *nul disseisin*. At the trial in this court, both parties claimed title under Franklin Graves.

It appeared that on the 25th of January 1854 Franklin Graves conveyed the premises to Josiah Allis by a warranty deed, and Allis at the same time executed to Franklin Graves a bond of defeasance for the reconveyance of the land upon payment of the sum of \$1,600 in three years and interest annually, and for the possession of the land during the three years by the obligee, he paying the interest, taxes, and insurance.

The tenant gave in evidence an assignment, under seal, from Franklin Graves to the tenant, indorsed on said bond, and dated March 18th 1854, assigning "unto the said Erastus L. Graves, his executors, administrators, and assigns, the within written bond or obligation, and the sum of sixteen hundred dollars mentioned in the condition thereof, together with all interest due and to grow due for the same, and all my right, title, interest, claim, and demand whatsoever in and to the same, and all the right, title, and interest which the said bond gives me in said sum of money, or the land to which it relates." This assignment was not acknowledged before any magistrate, but was recorded in the registry of deeds.

The demandant claimed title under a subsequent attachment and levy of execution upon the land as the property of Franklin Graves; and contended that the assignment was ineffectual to convey any title in the land to the tenant, for the following reasons:

1st. Because it was uncertain in its terms, and therefore void; inasmuch as it was, in terms, not a mere transfer of the bond, but also a transfer of the sum of \$1,600 mentioned therein, which was not a sum due to the obligee, but the mortgage debt which he was to pay to the obligor.

2d. Because, so far as its purpose could be ascertained, it was a mere assignment of the bond, as a contract or chose in action, and not of any interest in the land; the assignment not running to the assignee's heirs, and not being acknowledged, nor treated by the parties as a deed; and not purporting to convey the title which the assignor originally had, but only "all the right, title, and interest which the said bond gives me in the land to which it relates," which was no interest whatever; that, if the bond had been originally made

S. W. (Ky.) 850; *Putnam v. Story*, 132 Mass. 205; *Sjoblom v. Mark*, 103 Minn. 193; *Dedeaux v. Cuevas*, 107 Miss. 7; *Wootton v. Dynes*, 83 N. J. Eq. 163; *Bernard v. Benson*, 58 Wash. 191; *Camp Mfg. Co. v. Carpenter*, 112 Va. 79; Scott, Cas. on Trusts, p. 623.

to a third person, it would have given him no interest in the land, and an assignment of it to him had no greater effect.

3d. Because, as a deed, it was ineffectual, for want of acknowledgment, and of any legal record.

Dewey, J., being of opinion that, for some or all of these reasons, the assignment was insufficient to defeat the demandant's title under his attachment and levy of execution, took the case from the jury, and reserved the question for the full court, with an agreement that if the ruling was right, the tenant should be defaulted; if not, the case should stand for trial.

SHAW, C. J. It is very clear that the warranty deed from Franklin Graves to Allis, and the simultaneous bond to reconvey upon payment of a sum of money, constituted a mortgage to Allis, and left an equity of redemption in Franklin Graves.

The court are of opinion that the effect of the assignment of the instrument of defeasance by Franklin Graves to Erastus L. Graves, with all his right, title, and interest in the land therein described, constituted a conveyance of the equity of redemption.

But the instrument of defeasance, not being acknowledged, was improvidently admitted to registration, and the record does not operate as constructive notice of the execution of the assignment of the equity of redemption, as against an attaching creditor of the equity; and therefore the title of the attaching creditor, though subsequent in time, takes precedence of the assignment.

We think however that, under the circumstances, it is proper that the case should go to a new trial, to enable the defendant to prove, if he can, actual notice to the plaintiff of the prior assignment of the equity, when he made his attachment.¹ *New trial ordered.*

FROST AND OTHERS v. BEEKMAN

1 Johns. Ch. (N. Y.) 288. 1814.

THE CHANCELLOR [KENT²]. . . . Another and a more interesting question, is respecting the extent and effect of the registry of the defendant's mortgage, as notice to purchasers. It was a mortgage

¹ See *Harris v. Reed*, 21 Idaho 364; *Blood v. Blood*, 23 Pick. (Mass.) 80, 84; *Tinnin v. Brown*, 78 Miss. 378; *Heintz v. Moore*, 246 Mo. 226; *M'Bee v. O'Connell*, 16 N. M. 469; *Indian Land Co. v. Scott*, 59 Okla. 240; *Heister v. Fortner*, 2 Bin. (Pa.) 40; *Phillis v. Gross*, 32 S. D. 438; *Dean v. Gibson*, 48 S. W. (Tex. Civ. App.) 57; *South Penn. Oil Co. v. Blue Creek Co.*, 77 W. Va. 682; *Ihrig v. Ihrig*, 78 W. Va. 360.

Compare *Moore v. Ollson*, 105 Ark. 241; *Carter v. Champion*, 8 Conn. 549; *Nordman v. Rau*, 86 Kan. 19, 38 L. R. A. n. s. 400 note; *Cain v. Gray*, 146 Ky. 402; *Ammerman v. Linton*, 279 Mo. 439; *People v. Donegan*, 226 N. Y. 84; *Bliss v. Tidrick*, 25 S. D. 533, Ann. Cas. 1912 C. 675 note; *Hitt v. Caney Coal Co.*, 124 Tenn. 334; Mass., Gen. Laws (1921), C. 183, §§ 29-42.

² Part only of the opinion is here given.

for 3,000 dollars, and, by mistake, the registry was only for 300 dollars. This mistake is the whole cause of the controversy.

The Mortgage Act of the sess. 24 *ch.* 156, declared, among other things, that the registry of a mortgage should contain, not, indeed, the mortgage at large, but the essential parts of the mortgage, and among other specified parts, "the mortgage money, and the time, or times, when payable." To this register all persons whomsoever, at proper seasons, are at liberty to have recourse; and the Act declared that mortgages were to have preference, as to each other, according to the times of registry, and that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser, unless the same should have been duly registered, as aforesaid." This registry is notice of the mortgage to all subsequent purchasers and mortgagees; and so the Act was construed, and the law declared, by the Court of Errors, in the case of *Johnson v. Stagg*, 2 Johns. Rep. 510. The English authorities on this point do not, therefore, govern the case. The language of those authorities, undoubtedly, is, that the registry is not notice, though that doctrine is much questioned, and the point seems still to be floating and unsettled. *Bedford v. Backhouse*, 3 Eq. Cas. Abr. 615, pl. 12; *Wrightson v. Hudson*, Ib. 609, pl. 7; *Morecock v. Dickins*, Amb. 678; *Latouche v. Dunsany*, 1 Schoale & Lefroy, 157; Sugden (3d Lond. ed.), 524–527; Com. Dig. tit. 32, Deed, ch. 21, s. 11. The only question with us is, when, and to what extent, is the registry notice? Is it notice of a mortgage unduly registered? or is it notice beyond the contents of the registry?

The true construction of the Act appears to be, that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The Act, in providing that all persons might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase, without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the Statute; nor is it repugnant to the doctrine contained in the books, that notice to a purchaser, of the existence of a lease, is notice of its contents. *Taylor v. Stibbert*, 2 Ves. jun. 437; *Hiern v. Mill*, 13 Ves. jun. 118–120; *Hall v. Smith*, 14 Ves. jun. 426. In that case, the party is put upon inquiry and he must make

Facts:—Complainants are mortgagors and seek to foreclose.

it, or abide the consequences. The decision, in *Jackson v. Neely*, 10 Johns. Rep. 374, was made upon the same principle; and it was held that the recital in a deed of a letter of attorney, by which it was made, was notice to the purchaser of the existence of such a power. But here the Statute did not mean to put the party upon further inquiry. The registry was intended to contain, within itself, all the knowledge of the mortgage requisite for the purchaser's safety.

The question does not necessarily arise, in this case, how far the unauthorized registry of a mortgage, as one made, for instance, without any previous legal proof, or acknowledgment, would charge a purchaser with notice of the mortgage. The better opinion, in the books, seems to be, that it would not be notice, and that equity will not interfere in favor of an encumbrancer, when he has not seen that his mortgage was duly registered. Sugden's Law of Vend. 527; 1 Schoale & Lefroy, 157; *Heister v. Fortner*, 2 Binney, 40. But here everything was done that could have been previously required of the mortgagee. The mortgage was duly presented for registry, and he was not bound to inspect and correct the record. This was the exclusive business and duty of the clerk, and there is no reason why the registry should not operate as notice, to the amount of the sum mentioned therein; and, indeed, so far the obligation of the registry is admitted by the bill.

I conclude, therefore, that the registry was notice to purchasers, to the amount, and only to the amount, of the sum specified in the registry.¹

GEORGE AND EDWARD CURTIS v. LYMAN AND OTHERS

24 Vt. 338. 1852.

THE facts sufficiently appear in the opinion of the court, which was delivered by

HALL, J. This is an appeal from chancery. The bill is for the foreclosure of a mortgage in common form. The complainants are the mortgagors; one of the defendants, Edgerton, being the mort-

¹ See s. c. on appeal, 18 Johns. 544 (1820).

See *Sinclair v. Gunzenhauser*, 179 Ind. 78; *Farabee v. McKerrihan*, 172 Pa. 234.

But compare *Mims v. Mims*, 35 Ala. 23; and see *Cawthorn v. Stearns*, 60 Fla. 313; *Latourell v. Hobart*, 135 Minn. 109.

"This question could never arise between a mortgagee and a subsequent judgment-creditor, for the plain reason, that such a creditor is not a purchaser, nor entitled to the privileges of that position.

"So far as the Statute goes, in giving him a preference over mortgages not perfected by a delivery to the recorder, his rights are absolute, but for everything else, he is remitted to general principles; and upon general principles, it is very clear that he acquires a lien only upon the interests of his debtor, and is bound to yield to every claim that could be successfully asserted against him." *Tousley v. Tousley*, 5 Ohio St. 78, 87 (1855).

gagor, and another defendant, Lyman, being a purchaser under Edgerton.

The facts found and about which there is little or no controversy, are these:—

Edgerton being indebted to the plaintiffs by note in the sum of \$2000, mortgaged to them certain lands, which mortgage was transcribed upon the book of records of the town on the 11th of June, 1835, and duly certified as recorded; but no reference to the record was entered upon the alphabet. Subsequently, the defendant Lyman, without actual notice of the mortgage, and before the record of it was alphabetted, for the consideration of \$5000, purchased the same land of the mortgagor, his deed being recorded Feb. 7, 1839. Both the mortgage and deed were received for record and certified as recorded by Edgerton, the mortgagor, who from March, 1835, to March, 1841, was the town clerk, and the reference to the mortgage was first entered on the index by the subsequent town clerk in August or September, 1844. There is no evidence that the mortgagees had any knowledge of the neglect of the town clerk to enter their mortgage on the alphabet, and they must be taken to be ignorant of it. No other objection is made to the record, but the want of an index to it, and it is to be treated as having been in all other respects regular and sufficient.

The question is, whether the neglect of the clerk to index the mortgage, shall render the record of it invalid, so as to postpone the title of the mortgagees to that of the subsequent purchase.

The determination of this question must depend upon the construction of the Statutes of 1797 in relation to the recording of conveyances, which Statutes were in force when both deeds were lodged in the town clerk's office.

The 5th section of the Act for Regulating Conveyances of Real Estate, specifies the several requisites of such conveyances. It declares "that all deeds or other conveyances of any lands, tenements or hereditaments, lying in this State, signed and sealed by the party granting the same, having good and lawful authority thereunto and signed by two or more witnesses, and acknowledged by such grantor or grantors before a justice of the peace, *and recorded, at length, in the clerk's office of the town, in which such lands, tenements or hereditaments lie*, SHALL BE VALID TO PASS THE SAME, without any other act or ceremony in law whatever."

If the language of this Statute were to be taken in its ordinary sense and serve to control our decision, there would seem to be but little doubt of its effect. There would in regard to the mortgage appear to have been a full and literal compliance with the words of the Statute. The mortgage had been *transcribed* at length in the town clerk's office, and by the proper officer, and duly certified as recorded; and that is what is commonly understood as constituting a record of it.

It is, however, said, that although the ordinary signification of the word "recorded" may be satisfied by what was done in this case, yet, that the Act regulating town meetings and the choice and duty of town officers, is to be construed as providing an additional requisite to the record of conveyance — in other words, as in effect declaring that a deed shall not be considered as recorded, until an index to it is entered upon the alphabet.

No such language is, however, found in that Act, nor do we think any intention to engraft such additional requisite upon a deed can be fairly implied from the language used. The object of the Act is to point out the duty of the clerk, not only in the making of a proper record of conveyances, *but also in furnishing facilities for* their discovery, examination and use by all persons interested in them. And to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them, and to the security of the party injured is superadded, by a subsequent Statute, the responsibility of the town. The index or alphabet, which it is the duty of the clerk to have annexed to his book, seems to be one of the facilities to be used in making search for the record, not a part of the record itself. It is his duty to have an index, and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so, he and the town are liable for the damages any person may suffer by it. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be void. The clerk may know the place of the record and may point it out to all who may wish to examine it. A purchaser may take his deed, relying alone upon the representations or covenants of his grantor, without desiring to examine the records. An index, or the want of it, would seem to be of no importance to him. So if without making any search or causing any to be made, a purchaser should rely solely on the representations of the clerk, that the title was clear, and those representations should be knowingly false, it is perhaps questionable whether he could be said to be injured by the want of an index. That would only seem to become important when an actual search of the records was desired to be made. The legitimate ground of complaint in such case would probably be the fraudulent representations of the clerk.

There are many practical difficulties in the way of making an index to the record an essential requisite to the validity of the title. The Statute provides for an "index or alphabet." Are the two words used synonymously? Or have they here, as they often have, different meanings? Is it indispensable that the index should be in alphabetical order? If so, shall the name of the grantor or the grantee be alphabetted? Or shall there be two indexes, one of each? Must the Christian name be written at length, or will the initials be sufficient? It is obvious, that if an index is held to be an essential part of the record, the way will at once be opened for a serious and em-

barrassing course of litigation in settling by judicial construction, what shall constitute a sufficient index, and what departures from a prescribed form shall render the record invalid. And all this, perhaps, when there has been no real injury to any one in consequence of a defective index.

But if from the want of an index, or a proper entry upon it, the record is to be inoperative, shall it be held absolutely void? If the reference to it upon the index be not made the instant the record is completed, is the record a mere nullity? Or may the record be restored and made operative by a subsequent entry upon the index? If so, when does the record take effect? If from the entry on the index, how is the true time to be shown? Shall the clerk certify upon the record the time of the entry? That has never been done. The true time the record takes effect must then in all cases be left open to be proved by parol! In this case it appears by the evidence of the town clerk, that the plaintiff's mortgage was first alphabetted some time in August or September, 1844.

This evidence is quite too loose and uncertain, from which to determine when a record is to become operative, as all parol evidence necessarily must be. It is obvious, that if an entry of a deed upon the index is held to be essential to the validity of the record, that it must necessarily lead to inextricable confusion and uncertainty in regard to the priority of conveyances. Indeed, the difficulties in the way of a decision to that effect, appear to us to be insurmountable. On the other hand, we do not perceive but that the object of the Statute's providing for the recording of deeds will be fully answered by leaving anybody, actually sustaining an injury from the want of an index, or by a defective one, to his Statute remedy against the clerk and the towns.

The case of *Sawyer v. Adams*, 8 Vt. R. 172, has been relied upon by the defendants' counsel, as having an important bearing upon the question in this. But our decision does not conflict with the law of that case. The facts in that case were peculiar. From them, the court found that there had been in effect no record of the deed upon the book of records. Chief Justice Williams, in delivering the opinion of the majority of the court, puts the case upon that ground. He says, "that recording means the copying the instrument to be recorded into the public records of the town, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor." This, the court held, had not in that case been done. But it had clearly been done in this case. The deed was copied by the town clerk into the proper book, in the proper place, and duly certified as recorded, which would doubtless have been held by the court at that time, to have been sufficient.

We are all agreed that the proper office of the index is, what its name imports, to point to the record, but that it constitutes no part of the record; and we must consequently hold, that the plaintiff's

*Held! -
index is
not part of
the record
so pl.
mortgage because
subsequent to
the loan from
we it was
comparing upon
to record & def.
In person took
his title subject
to it*

Facts: - action to foreclose mortgage on lot 12 city of Keokuk. Def. lot prop. without notice of pl. mortgage. Recorder failed to index mortgage so def. claims no constructive notice.

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BARNEY v. McCARTY

mortgage became an encumbrance upon the land from the time it was transcribed upon the record, and that the defendant Lyman took his title subject to it.

The result is, that the decree of the Court of Chancery is to be affirmed, with directions to that court to fix upon a time for redemption and to carry this decree into effect.¹

BARNEY v. McCARTY ET AL.

15 Iowa 510. 1864.

This is an action brought to foreclose a mortgage upon lot 12, block 29, City of Keokuk, executed by Jonathan McCarty, to Marsh, Lee, & Delavan, for balance of purchase money, and which has now become the property of petitioner.

The mortgage was dated 23d of October, 1847, duly acknowledged 25th of October, 1847, filed in the recorder's office of Lee County for record on the 17th day of December, 1847, and was recorded at large on the 7th day of January, 1848, in book 2, page 186, being in its proper order and place in said records; and on the original instrument is indorsed a memorandum of the date of filing, date and book and page of the record, which is signed by the recorder, all in the manner required by law. All this is admitted; but it appears no index to the said record was made until after this suit was commenced, which was in January, 1859. In the mean time said McCarty had sold said lot, and the several defendants have become owners of parts thereof, who now claim to be innocent purchasers for value, without notice. In an amended petition, all defendants are charged with having personal notice, but the proof taken fails, it is admitted, to bring this home to any except Wm. and R. L. Ruddick and Guy Wells.

McCarty sold lot & def. claims to by B. F. P.

The District Court rendered a personal judgment against McCarty, the mortgagor, but refused to decree said lot or any part thereof to be sold to pay said mortgaged indebtedness. From this the plaintiff appeals, and holds that the court should have ordered said lots to be sold to pay the purchase-money due him.

DILLON, J. I. The first ground upon which the appellant seeks to reverse the decree below is, that the defendants, Wm. and R. L. Ruddick and Guy Wells, had actual notice of the mortgage in suit at the time when they respectively purchased the portions of the lot now owned by them.

Pl. claims not B. F. P. but had notice

This question cannot for several reasons be examined in this court. By the Revision (§ 3000) mortgages are to be foreclosed as in cases of ordinary proceedings; and by section 2999 the court on appeal

¹ Accord, *Chatham v. Bradford*, 50 Ga. 327; *Bishop v. Schneider*, 46 Mo. 472; *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257; *Armstrong v. Austin*, 45 S. C. 60

Held:- No constructive notice - def.
1. No actual notice at time def. paid money as B.F.P.
2. No constructive notice because to determine such is mere
construction of statute. Looking at requirements the st.
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"shall try only the legal errors" [of the cause] "duly presented, as in a case of ordinary proceedings, including the sufficiency of the facts stated on the record as the basis of the judgment to warrant the same."

Wells & Ruddick had no notice.

As to Guy Wells, the record does not show that there was any finding of the facts, either by a jury or by the court, as required by the last cited section of the Revision. As to the Messrs. Ruddick an issue was made to a jury, who found that they had no notice independent of the record of the mortgage in suit at the time when the deed of trust under which they claim was executed. No exception was taken to this finding of the jury and no motion was made to set the same aside as being against the weight of evidence or for any other cause. There is, therefore, no "legal error duly presented" to the appellate court for its review so far as relates to the question of actual notice. See *Docterman v. Webster*, decided at the present term.

Pl. claimed def. Ruddick notified of the mortgage.

II. It is furthermore claimed, by the plaintiff, that Ruddick is not a bona fide purchaser, because, on the day on which he purchased under his deed of trust and before the completion of such purchase, he was notified by the plaintiff's agent of the existence of the mortgage in suit. The fact of such a notice is conceded, and the only question which arises is, what effect, if any, it will have upon Ruddick's rights? To sustain his position, the plaintiff refers to *Thomas v. Graham*, Walk. Ch. 118; *Jewett v. Palmer*, 7 John. Ch. 65; and *Miner v. Willoughby*, 3 Minn. 239; which are to the effect that "A plea of a bona fide purchaser, without notice, must aver not only a want of notice at the time of the purchase, but also at the time of its completion, and of the payment of the money. The money must be actually paid before notice." Many other cases might be referred to, establishing the same principle.

Must be notified at time purchased gives money. none here

But, unfortunately for the plaintiff, his case does not fall within the reason upon which this principle is based. If Ruddick had no notice at the time when he advanced his money and received his deed of trust in security therefor, no subsequent notice can affect him or in any way cut down his rights. He is in law considered as occupying as high ground as an absolute purchaser, from the moment he parts with his money. Mortgagees are within the protection of the Statute, as well as purchasers. (R. S., 1843, p. 208, § 30; Code, 1851, §§ 1211-1214; *Porter et al v. Green et al.*, 4 Iowa, 571).

Constructive notice

III. We now arrive at the principal and most important question in the cause, and that is, whether the defendants are affected with constructive notice of the plaintiff's mortgage.

Did failure index this mortgage deprive of constructive notice.

And this raises but one inquiry, viz., whether under the registration laws then in force, the total omission by the recorder to index this mortgage, deprived the record thereof of the power of imparting constructive notice of its existence and contents.

The prior decisions of this court, although not covering a case

Deed: - said indexing was one of 3 essentials to proper
& rapid recording, not complete & no constructive notice
when this index is not present

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precisely like the present, aid nevertheless most materially in its solution. In other States there exists a most perplexing conflict of authority respecting the question whether the grantee in an instrument, or a subsequent purchaser, shall suffer for the mistake or omission of the recorder in registering it, or neglecting to register it. By some courts it is considered, that where the party has duly deposited his deed with the proper officer for record, he has performed his whole duty, and consequently the subsequent mistake or neglect of the recorder will not affect him or invalidate his title. (*Nichols v. Reynolds*, 1 R. I., 30, 31; *Cook v. Hall*, 1 Gilm., 575; 2 Sug. Ven., 466; *Merrick v. Wallace*, 19 Ill., 486; *McGregor v. Hall*, 3 S. & P., 401; 10 Ala., 368; *Beverly v. Ellis*, 1 Rand. [Va.], 106.)

Source etc.
lay blame
on recorder
after party
deposited the
deed.

In the case last cited, the court went so far as to hold, that where a deed is filed for record, it is in contemplation of law recorded, though it should, in consequence of being stolen, never be entered upon the record. But the current of authority is otherwise, holding it to be the duty of the party filing the instrument, as between him and a subsequent *bona fide* purchaser, to see that all of the pre-requisites of a valid and complete registration are complied with. (*Frost v. Beekman*, 1 John. Ch., 288; 10 John., 544; *Jennings v. Wood*, 20 Ohio, 261; 8 Verm., 175; 1 Story's Eq. Jur., § 404; 10 Verm., 555.) And this question, conceded not to be free from difficulty, was upon solemn deliberation settled in this court in *Miller v. Bradford, et al.*, 12 Iowa, 14. With this decision we are content, and the question cannot be regarded as being any longer an open one in this State. Agreeably to the doctrine there established, it was the duty of the mortgagee of the instrument in suit, to see that the essential requirements of the registry law were observed; for, unless substantially observed, the registry thereof would not impart constructive notice to subsequent mortgagees or purchasers, and consequently the loss, if any, will fall upon him or his assignee, and not upon them.

Major rule:
burden on
one filing
to see O.K.

We now advance one step further, with a view to ascertain whether the indexing of the mortgage was an essential requirement of the Statute. The mortgage in question was executed and filed for record during the time when the Revised Statutes of 1843 ("The Blue Book") were in force. There are three Acts which relate to this subject, viz.: 1st. Section 30 of the Act of February 16, 1843 (R. S., 202), entitled "An Act to regulate Conveyances." 2d. Sections 3 and 4 of the Act of February 14, 1843 (R. S., 442), entitled, "An Act concerning Mortgages." 3d. Section 4 of the Act of January 23d, 1843 (R. S., 541), entitled "An Act relating to the Office of Recorder of Deeds."

was indexing
the mortgage
an essential
requirement of
the statute.

These laws were all passed at the same session, and within a month of each other. Being *in pari materia*, they are not only to be construed together, but to be construed, if it can fairly and reasonably be done, so as to give operation and effect to each.

constructive notice
depends on
statute.
act Feb. 16/1843

Taking these Acts as a whole, they very clearly point out the successive steps which together constitute a complete and therefore valid registration of an instrument. As constructive notice, by means of recorded instruments, depends wholly upon statutory provisions, it is necessary carefully to examine those provisions. As concerns the present inquiry, the substance of the Act of February 16, 1843, is, that the proper instrument "shall be recorded in the office of the recorder of the county in which the real estate is situated." (§ 29), and "shall (§ 30), from the time of filing the same with the recorder, impart notice to all persons of the contents thereof."

While provision is thus made as to the effect of filing, no provision is made as to the manner of filing, or noting, or mode of recording. The Act of February 14, § 2 (R. S., 442), after repeating almost literally the above language, as to the effect of filing, proceeds, in the next section (3), thus to point out the duty of the recorder: "It shall be the duty of the recorder to indorse on every mortgage filed in his office for record, and note in the record the precise time such mortgage was filed for record."

By analyzing the fourth section of the Act of January 23, 1843, it will be seen that the recorder is required to perform the following acts, not only with respect to mortgages, but all instruments authorized to be recorded:

1. "File all deeds, &c., presented to him for record, and note on the back of the same the hour and day when they were presented for record."

2. "Keep a fair book on which he shall *immediately* make an entry of every deed, giving date, parties, description of land, dating it on the day when it was filed at his office."

3. "Record all instruments in regular succession."

4. "Make and keep a complete alphabetical index to each record book, showing page on which each instrument is recorded, with the names of the parties thereto."

This Act is silent as to the time when notice commences, but is specific as to the mode of making and keeping the registry.

Reading these various Statutes together in the light of the known objects of registration laws, the court is of opinion that each of the following steps is necessary to be substantially observed, in order to constitute a compliance with their requirements:

1. The instrument must be deposited or filed with the recorder for record. He thereupon notes the fact and "the hour and day" on the back thereof, and the day on "the fair book," as it is styled, and retains the instrument in his office. The instrument itself thus remaining on file in his office, with the indorsement upon it, and the entries in the "fair book," which are required to be immediately made, constitute the notice until the instrument is actually extended upon the records.

2. The next step in the process is the recording, that is, the copying

Necessary
acts to
make a
valid
registration
1. Instrument
entered at
once on the
"fair book"

2. Recording.

of the instrument at large into the "record book," and noting in it the precise time when it was filed for record. The object of this noting is that the record may show on its face when the notice commences.

3. Index.

The third and final step is the indexing of the instrument so recorded. The Statute prescribes the requisites of the index. It shall be a complete alphabetical index to each record book, and shall give the names of the parties, and show the page where each instrument is recorded. The paging cannot, of course, be given until the deed is actually transcribed into the record book, and up to this time it remains on file. When recorded and indexed, the deed may be withdrawn, and the record takes its place and constructively imparts notice to the world of its existence and contents.

Keeping in view alike the well-known objects and the enlightened policy on which the Registry Acts are based, as well as the language and requirements of the several Statutes above cited, the court are of the opinion, that all three of these steps are essential integral parts of a complete valid registration. It follows that, inasmuch as the plaintiff's mortgage was never indexed at all until after the defendant's right attached, the record thereof was so incomplete and defective as not constructively to charge subsequent purchasers or mortgagees with notice.

no constructive notice for no index

And having stated the result, we might here properly conclude, were it not due to the elaborate research of counsel, as evinced in their arguments, that we should state somewhat more at large the reasons for our opinion.

The plaintiff's counsel, looking at a detached portion of these Acts, rests his case wholly upon the statutory declaration, that notice of the existence of the mortgage shall date "*from the time the same is filed in the recorder's office for record.*" As the filing is but one step in a series of steps, this language presupposes, and is in fact based upon the assumption that the other, and in the order of time, the subsequent requirements of the law, will be observed. We ask this question: Would the mere filing be notice, if the instrument were never recorded, and if the grantee should voluntarily withdraw it before registration? Certainly not; and yet the literal construction which is insisted on by the plaintiff would so require us to hold.

Again: The meaning of this language has been determined by the recent decision of *Miller v. Bradford et al.*, 12 Iowa, 14. "This Statute," says Wright, J., "in our opinion, was only intended to fix the time from which notice to subsequent purchasers was to commence, and not to make such filing or depositing notice of the contents *after* the same was recorded." The correctness of this view is supported by both reason and authority. Without this provision, it would remain uncertain whether notice dated from time of filing, or only from the time of actual registration; and to settle and fix this most material matter was the cardinal and primary design of

the Legislature. See on this point *Barney v. Little et al.*, decided at the present term.

We are referred to the case of *Cook v. Hall*, 1 Gilm., 575, as being against the view we have taken. It is true that the Illinois Statutes are the same as ours, and the case is apparently, but yet not really, in point. The deed in that case was deposited with a deputy recorder *de facto*, who omitted to enter it on the "fair book" provided for by the law, but the deed itself remained on file. The court held that it was notice from the time of filing the same, and that the requisition about the entry in the "fair book" was only directory. The case did not turn on the necessity of an alphabetical index, after the deed was registered and withdrawn. Besides this case, as well as the subsequent one of *Merrick v. Wallace*, 19 Ill. 486, in the reasons given for the decision, conflicts with the doctrine of this court in *Miller v. Bradford*, *supra*, inasmuch as it is considered that any omission or fault of the recorder must fall upon a subsequent purchaser, and not upon the party who files the instrument for record.

Plaintiff also relies upon *Curtis v. Lyman*, 24 Vt. 334. The court in this case, under a Statute which provided "That a book or books, *with an index or alphabet to the same*, suitable for registering deeds, &c., shall be kept in each town, in which the clerk should truly record all deeds," &c., held, that an innocent party was affected with notice of a mortgage which, though duly recorded, was never indexed. In setting forth the reasons for this decision, the court says:

"It is obvious that if an index is held to be an essential part of the record, the way will at once be opened for a serious and embarrassing course of litigation in settling, by judicial construction, what shall constitute a sufficient index, and what departures from a prescribed form, shall render the record invalid; and all this perhaps when there has been no real injury to any one in consequence of a defective index. But if, from the want of an index, or a proper entry upon it, the record is to be inoperative, shall it be held absolutely void? If the reference to it upon the index be not made the instant the record is completed, is the record a mere nullity? Or may the record be restored and made operative by a subsequent entry upon the index? If so, when does the record take effect? . . . We are all agreed that the proper office of the index is to point to the record, but that it constitutes no part of the record." As our Statute prescribes the requisites of the index which it requires, these reasons would not be applicable to it.

With us the practice has always been to search for titles through the names of the successive owners, and by means of the index. With us alienations of real estate are easy and numerous. There is not, as in Vermont, a registry in each town, but only one for each county. The record books are consequently numerous and voluminous. It is utterly impracticable to examine them page by page.

It is stated in the argument that the record books in Lee County already number some thirty volumes. An index is a necessity. The evidence in this case shows that an index was kept, but for some reason the mortgage in this suit was wholly omitted from it. If no index was required or kept, a searcher for titles would know what he had to do. But if one is kept, and if a given instrument is omitted and yet the record affects the purchaser with notice, it is a snare which will entoil the most diligent and careful.

A deed, in the language of counsel, might as well be "buried in the earth as in a mass of records without a clew to its whereabouts," or in the language of the Supreme Court of Vermont, in *Sawyer v. Adams*, 8 Verm., 172, the instrument might as well be written "on a slate or copied into the recorder's Family Bible, as into a book without being indexed."

We are also cited to *McLaren v. Thompson*, 40 Maine, 284. This case and *Handley v. Howe*, 22 Maine, 560, are, as they seem to us, confirmatory of our position. The Statute required "a noting on the book and on the mortgage of the time when the same was received."

The court (40 Maine, 284) says: "As there is an interval, longer or shorter as the case may be, between the delivery of an instrument to be recorded, and the recording of the same, the object of the above provision of the Statute is to protect the grantee, *during the time between the noting and recording*. The Statute, it will be seen, required the noting both on the mortgage and the book; and provided that the instrument "should be considered as recorded, when left with the clerk as aforesaid." It was held, that a noting on *both* was essential to make it constructive notice against an attachment levy. *Handley v. Howe*, 22 Maine, 560.

The analogies of the law support our view. Thus, an undocketed judgment is no notice. 2 Sug. Ven., 104.

To hold that an index is not essentially part of a valid and complete registration in this State, would overlook the uniform practice of relying wholly upon it to find the names of the various owners in tracing titles, and would also ignore the fundamental design of the Recording Acts, which is to give certainty and security to titles, by requiring all deeds and all liens to be made matters of public record, and thus discoverable by all persons who are interested in ascertaining their existence and who will examine the records in the mode which the law has pointed out. *Cummings v. Long*, 16 Iowa, 41
Decree affirmed.¹

¹ And see *Prouty v. Marshall*, 225 Pa. 570; *Richie v. Griffiths*, 1 Wash. 429.

NOTE.—Compare *Loser v. Plainfield Bank*, 149 Iowa 672; *Gillespie v. Rogers*, 146 Mass. 610; *Hillside Bank v. Cavanaugh*, 232 Mass. 157; *Savidge v. Seager*, 175 Mich. 47; *Lembeck Co. v. Barbi*, 90 N. J. Eq. 373, 91 N. J. Eq. 533; *Burns v. Ross*, 215 Pa. 293; *Crippen v. Bergold*, 258 Pa. 469.

GEORGE v. WOOD

9 All. (Mass) 80. 1864.

Facts:—

BILL in equity to redeem land from a mortgage. After the former decision in this case, reported in 7 Allen, 14, the parties agreed upon the following facts:—

On the 8th of August, 1853, Nathaniel Chessman, being seised of a tract of land in Milford, mortgaged it to Asa Wood, the defendant's intestate, to secure the sum of \$1000, which has never been paid, unless the release hereinafter mentioned from the defendant to Chessman operated as a payment of the same. Asa Wood afterwards died, and the defendant was appointed administratrix of his estate about the 1st of January, 1856. On the 12th of May, 1855, Chessman mortgaged a part of the land, described as bounded on land of Daniel Finley, with full covenants of warranty, to the plaintiff, to secure the sum of \$1500, which remains wholly unpaid. This mortgage was duly recorded in May, 1855. On the 4th of August, 1856, Chessman conveyed another portion of the land to Crawford Pierce, by deed of warranty, duly recorded on the 20th of November, 1856. On the 26th of February, 1857, Chessman conveyed another portion of the land to Daniel Finley, by deed of quitclaim, duly recorded on the 25th of March, 1857. On the 26th of February, 1857, the defendant released and discharged the lot conveyed to Pierce, describing it as running "to the southerly corner of land of Daniel Finley," from the operation of the mortgage to Asa Wood, by her deed of quitclaim to Chessman, recorded on the 16th of March, 1857.

In 1855 Chessman sold to Finley the lot described in the deed to the latter, of February 26th, 1857; and Finley claimed to have had a warranty deed thereof, which was lost.

There was no evidence that the defendant, at the time of executing her release to Chessman, had any actual knowledge of the conveyance to the plaintiff, or of that to Finley.

The case was reserved by Chapman, J., for the determination of the whole court.

HOAR, J. It must be considered as settled that when the owner of an equity of redemption conveys by deed of warranty a part of the mortgaged premises, neither he, nor his heirs, nor subsequent grantees with notice of the remaining part of the mortgaged premises, are entitled in equity to contribution from the first grantee, toward payment of the mortgage debt. *Chase v. Woodbury*, 6 Cush. 143. *Bradley v. George*, 2 Allen, 392. *George v. Kent*, 7 Allen, 16. *Kilborn v. Robbins*, 8 Allen, 466. The land remaining in the mortgagor is first chargeable; and the equity of his vendee will be enforced against any subsequent purchaser from him with notice. *Allen v. Clark*, 17 Pick. 47.

Rule:

Held:-
1.

The weight of authority seems to be that this equity of a purchaser from the mortgagor is one which the mortgagee must regard, if he has actual or constructive notice of it. *Parkman v. Welch*, 19 Pick. 231. *Brown v. Simons*, 44 N. H. 475. 1 Washburn on Real Prop. 572, and cases cited. 4 Kent Com. (8th ed.) 189, n. If the mortgagee, therefore, releases a part of the mortgaged estate to a purchaser, he must abate a proportionate part of the mortgage debt, if it be necessary to protect a prior purchaser, of whose title he had notice when he made the release. The equities between successive purchasers from the mortgagor will be in the order in which they take their conveyances, if the subsequent purchasers have notice of those which precede. *Guion v. Knapp*, 6 Paige, 35. *Clowes v. Dickenson*, 5 Johns. Ch. 235; s. c. 9 Cow. 403.

These principles must govern the rights of the parties to this suit; and the first question is, whether the defendant, when she executed the release of the lot purchased by Pierce, had notice of the prior conveyance to the plaintiff. His conveyance was on record, which he contends was constructive notice. The release was to the original mortgagor, and there is no proof of any other notice than the record of the plaintiff's deed. It has been held in New York that the recording of a second mortgage is not constructive notice to the mortgagee under a first recorded mortgage. *Wheelwright v. Depeyster*, 4 Edw. Ch. 232. *Talmadge v. Wilgers*, Ib. 239, n. *Cheesebrough v. Millard*, 1 Johns. Ch. 409. *Stuyvesant v. Hone*, 1 Sandf. 419. The same doctrine has prevailed in Pennsylvania. *Taylor v. Maris*, 5 Rawle, 51. And it was adopted by Mr. Justice McLean, of the Supreme Court of the United States. 3 McLean, 603.

The question is not free from difficulty, but we are not aware of any adjudged case to the contrary; nor indeed of any case in which the record of a deed has been held to be constructive notice to any persons other than subsequent purchasers, or those claiming title under the same grantor. 2 White & Tudor's Lead. Cas. in Eq. (Amer. ed.) 193. In *Parkman v. Welch*, *ubi supra*, it is to be observed that no question seems to have been suggested in the argument or decision as to the necessity of any notice to the mortgagee; and no allusion is made in the opinion to the effect of any prior equity resulting to the prior purchaser from the mortgagor. The case apparently rests upon the idea that all parts of the mortgaged premises were equally liable to contribute in proportion to their value, in the hands of separate purchasers, without regard to priority; and that the release of one parcel by the mortgagee would be a discharge *pro tanto* of the mortgage. In these respects it is not easy to see how the case can be reconciled with *Allen v. Clark*; and it is certainly inconsistent with the recent decisions of this court to which reference has been made. But these points, although necessarily involved in the decision, were not brought to the attention of the court; and the case of *Allen v. Clark* was decided before the justice

Rule.

Held:-
1. & record of deed
not constructive
notice to any
one but purchaser.

who gave the opinion in *Parkman v. Welch* came upon the bench, and had not then been reported.

In *Brown v. Worcester Bank*, 8 Met. 47, the right of a prior purchaser of a part of an equity of redemption to exemption from contribution to purchasers of the residue was not noticed by Mr. Justice Wilde, who gave the opinion in *Allen v. Clark*, although it apparently existed. But it is now firmly established as a rule in equity in this Commonwealth.

When, however, the purchaser seeks to enforce his equity against the mortgagee, it is reasonable to require strict proof of notice. He takes his title with full knowledge that it is subject to the mortgage; and if he does not perfect it by a release, he ought not to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage, in order to protect him; when by giving notice he can so easily protect himself. The establishing of such mere collateral equities, which do not affect the legal title, cannot be considered as within the purposes intended to be accomplished by the Statutes for registration of deeds.

The only remaining point which has been argued relates to the priority of equities between the plaintiff and Finley. The plaintiff contends that Finley's title preceded the grant to Pierce; and that the release to Pierce being made with notice of Finley's title, as shown from the recital in the release that the land bounded on the corner of Finley's land, discharged Finley from the obligation to pay the proportion of the mortgage which should have been borne by the Pierce lot; and that as Finley's title was subsequent to the plaintiff, the plaintiff is deprived of any right of subrogation against him. But the facts do not find when Finley's title was acquired, or his purchase-money paid. The only deed to Finley, which it is agreed ever existed, was subsequent to both the plaintiff's and Pierce's. If the recital in the release is proof of an earlier title, the similar recital in the plaintiff's deed would prove in like manner that Finley had a priority over the plaintiff. But we think a conclusive answer is, that this question of contribution cannot be settled without making Finley a party to the suit, which the plaintiff has not done. *Avery v. Petten*, 7 Johns. Ch. 211.¹

¹ See *Foster v. Carson*, 159 Pa. 477.

Compare, *Apstein v. Sprow*, 91 Conn. 421; *Fries v. Null*, 154 Pa. 573; *Camp Mfg. Co. v. Carpenter*, 112 Va. 79.

Held:—
2. strict proof of notice where purchaser seeks to enforce his equity vs. mortgagee.

SECTION III

POSTPONEMENT TO UNRECORDED DEEDS

EARLE v. FISKE AND ANOTHER

103 Mass. 491. 1870.

WRIT OF ENTRY against Elizabeth L. Fiske (wife of Benjamin Fiske), and Mary E. Fiske, to recover land in Malden. Writ dated April 14, 1868. Plea, *nul disseisin*.

At the trial in the Superior Court, before Putnam, J., these facts appeared: Nancy A. Fiske, being owner of the demanded premises, conveyed them to Benjamin and Elizabeth for their lives, and, subject to their life estate, to Mary E. Fiske, by deeds dated April 22, 1864, but not recorded till 1867, and died in 1865, leaving said Benjamin, her son, as her sole heir, and he in 1866 executed and delivered to the demandant a deed of the premises, which was recorded in the same year. Upon these facts, the judge ruled that Nancy A. Fiske "had no seisin, at her death, which would descend to Benjamin Fiske, so as to enable him to convey a good title" to the demandant. Upon this ruling, the demandant, who made no claim to any estate less than a fee simple, submitted to a verdict for the tenants, and alleged exceptions.

AMES, J. The formalities which shall be deemed indispensable to the valid conveyance of land are prescribed and regulated by Statute. A deed duly signed, sealed and delivered is sufficient, as between the original parties to it, to transfer the whole title of the grantor to the grantee, though the instrument of conveyance may not have been acknowledged or recorded. The title passes by the deed, and not by the registration. No seisin remains in the grantor, and he has literally nothing in the premises which he can claim for himself, transmit to his heir at law, or convey to any other person. But when the effect of the deed upon the rights of third persons, such as creditors or *bona fide* purchasers, is to be considered, the law requires something more, namely, either actual notice, or the further formality of registration, which is constructive notice. It may not be very logical to say that, after a man has literally parted with all his right and estate in a lot of land, there still remains in his hands an attachable and transferable interest in it, of exactly the same extent and value as if he had made no conveyance whatever. But, for the protection of *bona fide* creditors and purchasers, the rule has been established that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as against any other persons. As to all such other persons, the unrecorded deed is a mere nullity. So far as they are concerned, it is no conveyance or

FACTS:

1. Nancy Fiske conveyed land to Benjamin & Elizabeth for their lives remainder to Mary Fiske.
2. N. Fiske died leaving Benj. sole heir.
- 3.

transfer which the Statute recognizes as binding on them, or as having any capacity adversely to affect their rights, as purchasers or attaching creditors. As to them, the person who appears of record to be the owner is to be taken as the true and actual owner, and his apparent seisin is not divested or affected by any unknown and unrecorded deed that he may have made. Gen. Sts. c. 89, § 3.

It is argued, however, that, as the unrecorded deed from Nancy A. Fiske was valid and binding upon herself and her heirs at law, nothing descended from her to her son Benjamin, and he had no seisin or title which he could convey to the plaintiff. A case is cited (*Hill v. Meeker*, 24 Conn. 211) in which the Supreme Court of Connecticut (Hinman and Storrs, JJ.) in 1855 decided that a deed of land, not recorded until after the death of the grantor, is valid against a purchaser from his heir at law, although such purchaser has no knowledge of the existence of the deed. From this decision the Chief Justice (Waite) dissented, saying, "So far as my researches have extended, this is the first case in the whole history of our jurisprudence, in which it has ever been holden that an unrecorded deed shall defeat the title of a *bona fide* purchaser or mortgagee, having no knowledge of the existence of any such deed, unless it were recorded within a reasonable time." The cases cited from the decisions of the Supreme Court of Kentucky are to the effect also that the protection afforded by their registration laws against an unrecorded deed only extend to purchasers from the grantor himself, and not to purchasers from his heirs or devisees. *Ralls v. Graham*, 4 T. B. Monr. 120; *Hancock v. Beverly*, 6 B. Monr. 531. That court however in a more recent case, decided in 1857, say that, if it were a new question, "and had not been heretofore decided," they should be strongly inclined to give to the Statute a liberal construction, and make it operate as a remedy for the whole evil which it was intended to guard against. They add, however, that as the previous decision had become a settled rule of property, it is better that the law should remain permanent, "although settled originally upon doubtful principles." *Harlan v. Seaton*, 18 B. Monr. 312.

We do not, under the circumstances, incline to yield to the authority of these cases in the construction of a local Statute of this commonwealth. It appears to us that the plain meaning of our system of registration is, that a purchaser of land has a right to rely upon the information furnished him by the registry of deeds, and in the absence of notice to the contrary he is justified in taking that information as true, and acting upon it accordingly. It is impossible to see why the unrecorded deed of Nancy A. Fiske should have any greater weight or force after her decease than it had immediately after it was first delivered. It could not be any more or less binding on her heir at law than it was upon herself; he was as much the apparent owner of the land as she had been during her lifetime. The manifest purpose of our Statute is, that the apparent owner

of record shall be considered as the true owner (so far as subsequent purchasers without notice to the contrary are concerned), notwithstanding any unrecorded and unknown previous alienation. As against the claim of this plaintiff, the unrecorded deed of Nancy A. Fiske had no binding force or effect, and the objection of the defendants, that in consequence of her having given that deed nothing descended to her son Benjamin from her, is one of which they cannot avail themselves. As a purchaser without notice, the plaintiff is in a position to say that the unrecorded deed had no local force or effect; that she died seised; that the property descended to Benjamin, her son and sole heir at law. Upon that assumption, his deed would take precedence over the unrecorded deed of his mother, in exactly the same manner as a deed from his mother in her lifetime would have done over any unrecorded or unknown previous deed from herself. The ruling at the trial was therefore erroneous, and the plaintiff's

Exceptions are sustained.

MARSHALL v. ROBERTS

18 Minn. 405. 1872.

The plaintiff, claiming that the defendant was the owner of certain real estate, and that after having sold and conveyed the same to him, and knowing his deed was unrecorded, he sold and conveyed the same premises to other parties, who were purchasers in good faith, and whose deeds were recorded, brought this action to recover damages therefor. At the trial, after the plaintiff had introduced his evidence and rested, the defendant moved for a dismissal of the action. The court granted the motion and judgment of dismissal was entered. The plaintiff appeals to this court. The facts upon which the decision is based, are fully stated in the opinion of the court.

BERRY, J. For the purpose of determining the only question necessary to be considered in this case, we may assume that the following propositions, which plaintiff claims to have proved, or to have offered to prove, are true as matter of fact:—

1st. That on the 12th day of May, 1860, Louis Roberts was the owner of lot four, in block four, of the town of St. Paul, according to the recorded plat thereof.

2d. That on said 12th day of May said Roberts, together with his wife, executed and delivered to the plaintiff, Joseph M. Marshall, a quitclaim deed of all their right, title, interest, claim, and demand, in and to said lot, which deed through inadvertence on plaintiff's part has never been recorded.

3d. That on the 2d day of August, 1865, said Roberts (well knowing his deed to Marshall, and Marshall's inadvertent omission to have the same recorded) for a valuable consideration, executed and

delivered (his wife joining) to Uri L. Lamprey a quitclaim deed of all their right, title, interest, claim and demand in and to said lot, which deed was duly recorded August 3d, 1865, the said Lamprey at the time of said conveyance to him, and at the time of paying the consideration therefor, having no notice of the aforesaid conveyance to the plaintiff.

4th. That on the 22d day of May, 1867, said Lamprey and wife, for a valuable consideration, executed and delivered to William J. Cutler a warranty deed of said lot, which was duly recorded on the 29th day of May, 1867, the said Cutler at the time of such conveyance to him, and at the time of paying the consideration therefor, having no notice of said conveyance to the plaintiff, and having purchased in good faith.

Plaintiff's claim is, that by reason of defendant's deed to Lamprey, and the recording thereof, he (plaintiff) has lost his title to the lot in question, and has therefore suffered damage to the value of said lot, which damage he seeks to recover of defendant in this action.

If the deed from Roberts to plaintiff conveyed nothing to plaintiff, the subsequent deed to Lamprey can have taken nothing away from him, or, in other words, it cannot have damaged the plaintiff.

If on the other hand, as would appear from the facts before assumed, the deed from Roberts to plaintiff conveyed a good title to the lot in question, or any right, title, interest, claim, or demand in or to it, then, neither such good title, nor any such right, title, interest, claim or demand, could be taken away or impaired by the subsequent conveyance to Lamprey. For the deed to Lamprey is a quitclaim deed in common form, the effect of which, under our Statute, is to pass such estate as the grantor could lawfully convey by the ordinary deed of bargain and sale. In *Martin v. Brown*, 4 Minn. 291, it is held that the Legislature by the words "lawfully convey," intend to limit the estate conveyed by a quitclaim deed, to such as the grantor has a legal right to convey, and that as he may not lawfully convey land which he has already conveyed to another, nothing passes by such deed beyond the grantor's actual interest at the time of the conveyance. And in *Hope v. Stone*, 10 Minn. 152, where there was a conveyance (by warranty deed) of all the right, title, interest, &c., &c., of the grantor in and to certain land, it was held that nothing passed to the grantees by the conveyance which the grantor had previously conveyed to the other parties. (See also cases there cited.) In *Everest v. Ferris*, 16 Minn. 26, the rule thus laid down in *Martin v. Brown*, is reiterated; and independently (so far as appears) of any Statute, it is held in *May v. Le Claire*, 11 Wallace, 232, that a party who has acquired his title by a quitclaim deed cannot be regarded as a *bona fide* purchaser without notice, and that such conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. The provisions of our Statute in regard to the effect of recording and failing to

record deeds, are also in entire harmony with the views expressed in the case cited. Sec. 54, ch. 35, Pub. Stat., which seems to have been in force at the time when Roberts made the deed to Lamprey, enacts that every conveyance by deed, &c., shall be recorded, &c., and that every such conveyance not so recorded shall be void, as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. Substantially the same provisions as those above mentioned, are also found in sec. 24, chap. 46, Rev. Stat., and sec. 21, chap. 40, Gen. Stat., so that our Statute in this particular seems to have remained unchanged. These provisions, as will appear upon a moment's reflection, so far from militating against the views expressed in the cases cited, come to their aid, since it is only the purchaser of the *same* real estate, or any portion thereof, who by his priority of record cuts out the title of a prior purchaser. For when the second purchaser obtains by his quitclaim deed only what his grantor had (his grantor's right, title and interest) at the time when such deed was made, he is not a purchaser of the *same* real estate (or any part *thereof*) which his grantor had previously conveyed away and therefore no longer has. But besides this, the grantee in a quitclaim deed like that from Roberts to Lamprey, though he may not in fact have known that his grantor had previously conveyed the described premises to another, and though he may not in fact have intended to defraud such prior grantee, is not a purchaser in good faith as against such prior grantee, for nothing is attempted to be transferred to him, except whatever right, title, &c., the grantor has at the time when the quitclaim deed is executed, so that as in the case of *Hope v. Stone* the very terms of the deed are notice of the existence of the rights which have been conferred upon such prior grantee, or any other person.

These considerations, as it seems to us, dispose of this case and prevent us from reaching the questions mainly discussed by plaintiff's counsel.

The judgment entered below dismissing the action is affirmed.¹

¹ The doctrine of *Marshall v. Roberts* has been abrogated by statute in Minnesota. See *Strong v. Lynn*, 38 Minn. 315.

The following decisions are in accordance with the principal case. *Rucker v. Tenn. Coal Co.*, 176 Ala. 456; *First National Bank v. Timmins*, 4 Alaska 242; *Wickham v. Henthorn*, 91 Iowa 242; *Johnson v. Williams*, 37 Kan. 179; *Knox v. Doty*, 81 Kan. 138; *Messenger v. Peter*, 129 Mich. 93 (but see Michigan, Acts (1915), No. 199). Compare *Hooper v. Leavitt*, 109 Me. 70.

Contra. Hopkins v. Hebard, 194 F. R. 301; *The Henry Wrape Co. v. Cox*, 122 Ark. 445; *Kelsey v. Norris*, 53 Colo. 306; *Schott v. Dosh*, 49 Neb. 187; *Mabie-Lowery Co. v. Ross*, 189 Pac. (Okla.) 42; *Shutz v. Tidrick*, 26 S. D. 505 (but see *Fowler v. Will*, 19 S. D. 131; *Lusk v. Yankton*, 40 S. D. 498, 503); *McDougall v. Murray*, 57 Wash. 76. And see *Riley v. Robinson*, 128 A. D. (N. Y.) 178, 202 N. Y. 531; *Tucker v. Leonard*, 183 Pac. (Okla.) 907; *Southern Ry. v. Carroll*, 86 S. C. 56.

"The doctrine expressed in many cases that the grantee in a quitclaim deed

cannot be treated as a *bona fide* purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bona fide* purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind even when the title is known to be perfect. He may hold the property only as a trustee or in a corporate or official character, and be unwilling for that reason to assume any personal responsibility as to its title or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than one of quitclaim or of a simple transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a *bona fide* purchaser, however free, in fact, his conduct in the purchase may have been from any imputation of the want of good faith. In many parts of the country a quitclaim or a simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain and sale. If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a *bona fide* purchaser. But in either case if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a *bona fide* purchaser, upon showing that the consideration stipulated has been paid and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title, and against incumbrances or liens, does not raise a presumption of the want of *bona fides* on the part of the purchaser in the transaction. Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guaranties against future contingencies. The character of *bona fide* purchaser must depend upon attending circumstances or proof

as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property, or a clear title, must depend upon the character of the title of the grantor when he made the conveyance: and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the *bona fide* nature of the transaction on his part." *Per* FIELD, J., in *Moelle v. Sherwood*, 148 U. S. 21, 28.

"As against these evidences and conclusions of good faith but a single proposition is raised, one upon which the dissenting judge in the Circuit Court of Appeals rested his opinion, and that is the proposition that the conveyances from the Road Company were only quitclaim deeds, and that a purchaser, holding under such a deed cannot be a *bona fide* purchaser, and in support of this proposition reference is made to the following cases in this court: *Oliver v. Piatt*, 3 How. 333, 410; *Van Rensselaer v. Kearney*, 11 How. 297; *May v. Le Claire*, 11 Wall. 217, 232; *Villa v. Rodriguez*, 12 Wall. 323, 339; *Dickerson v. Colgrove*, 100 U. S. 578; *Baker v. Humphrey*, 101 U. S. 494; *Hanrick v. Patrick*, 119 U. S. 156. The argument, briefly stated, is that he who will give only a quitclaim deed in effect notifies his vendee that there is some defect in his title, and the latter, taking with such notice, takes at his peril. It must be confessed that there are expressions in the opinions in the cases referred to which go to the full length of this proposition. Thus, in *Baker v. Humphrey*, 101 U. S. 494, 499, Mr. Justice Swayne, in delivering the opinion of the court, uses this language 'Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation.' Yet it may be remarked that in none of these cases was it necessary to go to the full extent of denying absolutely that a party taking a quitclaim deed could be a *bona fide* purchaser; and in the later case of *McDonald v. Belding*, 145 U. S. 492, it was held, in a case coming from Arkansas, and in harmony with the rulings of the Supreme Court of that State, that while ordinarily a person holding under a quitclaim deed may be presumed to have had knowledge of imperfections in his vendor's title, yet that the rule was not universal, and that one might become a *bona fide* purchaser for value although holding under a deed of that kind; and in that case the grantee so holding was protected as a *bona fide* purchaser: while in the case of *Moelle v. Sherwood*, just decided, *ante*, 21, the general question was examined, and it was held that the receipt of a quitclaim deed does not of itself prevent a party from becoming a *bona fide* holder, and the expressions to the contrary, in previous opinions, were distinctly disaffirmed." *Per* BREWER, J., in *U. S. v. California etc. Co.*, 148 U. S. 31, 45. See *Devlin, Deeds*, 3d ed., §§ 671-673.

"So far as we are aware the application of the rule in this State has been limited to cases wherein the *grantee* in the quitclaim deed was the person claiming to be the purchaser in good faith. In the case at bar defendant Hodnett holds under a general warranty deed and the two deeds in the chain of title immediately preceding defendant's deed were also warranty deeds. The special warranty deed was therefore remote from the transaction by which Hodnett acquired title. Should the general rule applicable to the *grantee* in a quitclaim deed be applied to a grantee in a subsequent warranty deed?

"The great weight of authority upon what appears to us to be the sounder logic is to the effect that a subsequent grantee in a general warranty deed is not prevented from occupying the position of a *bona-fide* purchaser, without notice, merely because some prior conveyance in his chain of title is a quitclaim or special warranty deed." *Per* WILLIAMS, J., in *Marston v. Catterlin*, 270 Mo. 1, 14. And see *Rich v. Downs*, 81 Kan. 43; *Bradford v. Davis*, 219 S. W. (Mo.) 617.

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DOW v. WHITNEY

147 Mass. 1. 1888.

BILL in equity, filed August 7, 1887, for the specific performance by the defendant of an agreement to purchase land. The facts of the case are as follows.

On November 2, 1857, Stephen Dow became the owner of a tract of land in Brookline, including the premises in question, by deeds, which were duly recorded, from Samuel A. Robinson and others, and from Otis Withington, and subsequently conveyed portions of it, other than such premises, to different persons by deeds also recorded.

On November 1, 1878, Stephen Dow, by a deed, which contained the usual covenants of warranty, conveyed to "Alfred A. Dow, his heirs and assigns, all my interest in all that lot of land, with the buildings thereon, situated on Corey Hill, in Brookline, in the county of Norfolk and Commonwealth aforesaid, bounded on the north by Summit Avenue; east by land now or late of William Woods; north again by said Woods; east again by land now or late of Thomas Griggs; south by land of Henry M. Whitney, land of Mrs. John M. Clark, and Beacon Street; and west by land now or late of E. D. Jordan *et al.*, formerly of James Bartlett; being the same premises conveyed to me by S. A. Robinson *et al.*, also by Otis Withington, by deed dated November 2, 1857, and recorded with Norfolk Deeds, book 261, page 279, . . . hereby conveying to said grantee all the land conveyed to me by the deed aforesaid, except such portions thereof as I have heretofore sold."

On October 1, 1879, Alfred A. Dow, by a deed of like tenor as the above, conveyed "all my interest" in the same land to the plaintiff, who, on February 23, 1887, entered into an agreement in writing with the defendant for its sale and purchase, she to give a "good and clear title to the same free from all incumbrances."

The defendant contended that the deeds from Stephen Dow to Alfred A. Dow, and from the latter to the plaintiff, conveyed only such interest as each grantor actually had at the time of the delivery thereof, and was subject to possible unrecorded deeds theretofore made by each, but of which there was no evidence, and that the plaintiff could not make title in accordance with the agreement.

Hearing before C. Allen, J., who ordered a decree for the plaintiff; and the defendant appealed to the full court.

MORTON, C. J. It is clear that the clause following the specific description in Stephen Dow's deed, beginning, "being the same premises," etc., was not intended to limit the prior granting clause of the deed, or to alter the description, but was inserted for the purpose of showing the grantor's chain of title. *Lovejoy v. Lovett*, 124 Mass. 270.

The principal question in this case is whether the deed of Stephen Dow conveyed to the grantee a title which is superior to that of any grantee by a prior unrecorded deed of the grantor. This question was fully considered and discussed in *Woodward v. Sartwell*, 129 Mass. 210. In that case, it was held that a deed by an officer, upon a sale on execution of "all the right, title, and interest" of the judgment debtor in land specifically described in the deed, took precedence of a prior unrecorded deed of the judgment debtor, and conveyed to the purchaser a good title. The court put the decision upon the ground, that an attaching creditor has the same standing as a *bona fide* purchaser, and that the deed of the officer "is equivalent to a conveyance made by the debtor at the time the attachment was made; and in the case at bar, as the record title then stood in the name of the debtor, as to *bona fide* purchasers, he was the owner of the land."

We are satisfied that these views are correct. We can see no sound distinction between a deed made by an officer upon a sale on execution, and a deed made by the debtor himself. In either case, the deed conveys all the title which the debtor had, and no more; but a prior unrecorded deed has no effect except as between the parties to it, and others having notice of it, and as to creditors and purchasers leaves the title in the grantor. *Earle v. Fiske*, 103 Mass. 491.

A deed of "all the right, title, and interest," or of "all the interest," of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is as to them a mere nullity. The reasons for the rule apply with equal force in the case of a deed of the grantee's right, title, and interest, as in that of a deed of the land. We are of opinion, therefore, that the deed of Stephen Dow conveyed to his grantee a title which is good against any prior deed, if unrecorded. To hold otherwise would defeat the purpose of the registration laws, and create confusion in the titles to land.

It is to be noticed that the deed in this case contains a specific description of the land intended to be conveyed, and contains the usual covenants of warranty. The case is thus distinguished from a class of cases relied upon by the defendant, in which it has been held that, where a deed contains no particular description, but only a general description, like "all my land," or "all the land I have in Boston," or other similar general description, it does not take precedence of prior unrecorded deeds of the grantor. See *Adams v. Cuddy*, 13 Pick. 460; *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159; *Fitzgerald v. Libby*, 142 Mass. 235. In each of these cases the question was not as to the effect of a prior unrecorded deed of

the same land, but it was whether the land previously sold was included within the description of the later deed. In other words it was a question of the construction of the deed relied upon. No such question can arise in the case at bar, as the description of the land intended to be conveyed is specific and exact. The same considerations apply to the deed from Alfred A. Dow to the plaintiff.

The defendant contends that specific performance of his contract ought not to be decreed, because, if compelled to take a conveyance, he may afterwards be exposed to litigation to defend his title. It is not known that there is any unrecorded deed made by Stephen Dow or Alfred A. Dow. The only alleged defect is, that there is a possibility that there is such a deed, and that the grantee in it may hereafter appear and contest the defendant's title.

The defendant ought not to be required to accept a title that is doubtful. But in this case there is no reasonable doubt that the plaintiff's deed conveys a good title. Its validity depends upon a pure question of law, and no question of fact is involved. The mere possibility that a claimant may hereafter appear and ask the court to overturn a well settled rule of law is not such a defect or doubt in the title as ought to lead the court in its discretion to deny to the plaintiff the right in equity to a specific performance of the contract. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Chesman v. Cummings*, 142 Mass. 65.

As the parties agree to the form of the decree entered by the justice who heard the case, it should therefore be affirmed.

*Decree affirmed.*¹

BLADES v. BLADES

1 Eq. Cas. Ab. 358. pl. 12. 1727.

IN a case between two purchasers of lands in Yorkshire, where the second purchaser having notice of the first purchase, but that it was not registered, went on and purchased the same estate, and got his purchase registered; yet it was decreed, that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered was a fraud, the design of those Acts being only to give parties notice, who might otherwise, without such registry, be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of when they have notice thereof in any manner, though not by the registry. By LORD CHANCELLOR KING decreed.²

¹ See *Gallup v. Huling*, 241 F. R. 858; *Adams v. Cuddy*, 13 Pick. (Mass.) 460; *Fitzgerald v. Libby*, 142 Mass. 235; *Eaton v. Trowbridge*, 38 Mich. 454; *Garner v. Boyle*, 97 Tex. 460; *Cook v. Smith*, 107 Tex. 119; *McNamara Syndicate v. Boyd*, 112 Va. 145.

² See *Le Neve v. Le Neve*, Amb. 436. But compare at law *Doe d. Robinson v. Allsop*, 5 B. & Ald. 142.

STROUD, ASSIGNEE v. LOCKART ET AL.

4 Dall. (Pa.) 153. 1797.

701-725
omit

SCIRE FACIAS on a mortgage. The mortgage had not been recorded, conformably to the Act of Assembly; and Lockart had purchased the premises. But, on the trial, the plaintiff proved, that Lockart knew of the existence of the mortgage at the time of his purchase, and said he would have to pay it, although it was not then recorded.

BY THE COURT. The case is too plain for controversy. The plaintiff must have a verdict; and all the trouble of the jury will be to calculate the interest. *Verdict for the plaintiff.*¹

MAYHAM v. COOMBS, PARKER AND OTHERS

14 Ohio 428. 1846.

THIS is a bill in chancery reserved in the County of Clermont.

This bill is filed by the complainant to foreclose a mortgage, and to procure the sale of mortgaged premises. Benjamin Coombs is the mortgagor, Anna Parker, a mortgagee, and Mathias Kagler, a judgment creditor. There are other defendants, but, for present purposes, it is unnecessary to specify the relations in which they stand to the case.

The facts, so far as respects the several mortgages and the judgment, are as follows: Anna Parker, on the 12th day of March, 1838, contracted to sell to Benjamin Coombs one hundred and one acres of land, and which is the only land about which there is any controversy, and gave to him a title bond. At the same time she took his note for the purchase money, signed by James Coombs as his security. On the 18th day of July, 1840, she conveyed the same land, by deed duly executed, and took back a mortgage, to secure the payment of \$1,616, the balance due of the purchase money. This mortgage was recorded on the 11th day of November, 1840.

On the 30th day of October, 1840, Benjamin Coombs executed to the complainants a mortgage of the same premises to secure the payment of twelve hundred and sixty-nine dollars, which mortgage was entered for record on the day of its date.

This latter mortgage also covered fifty acres of land in addition to the one hundred and one acres, which, in 1837, had been mortgaged by Coombs to one Shadrack Lane, to secure the payment of two hundred and seventy dollars, which mortgage, on the 17th day of May, 1841, was assigned by Lane to the complainant. As to this fifty acres, there is not, at present, any controversy. On the 30th

¹ See *Clark v. McNeal*, 114 N. Y. 287; *Britton's Appeal*, 45 Pa. 172.

July, 1840, the defendant, Mathias Kagler, recovered a judgment in the Court of Common Pleas of Clermont County, against Benjamin Coombs, for \$506.25 and costs of suit.

Anna Parker, in her answer to the bill, charges that the complainant, at the time he received his mortgage, had full notice of the existence of her mortgage, and that, with a view to defraud her, he procured his to be first received; and she calls upon him, by interrogatories, to answer this charge.

In answer, he denies notice peremptorily. Much evidence, however, is on file to prove notice, but the view of the case taken by the court, renders it unnecessary to abstract this evidence.

The defendant, Parker, further alleges, in her answer, that the consideration of the note secured by the complainant's mortgage, is made up, in a great measure, of exorbitant interest, and such exorbitant interest compounded, from time to time; and she calls upon him by interrogatories to answer this allegation, and to set forth the original consideration, which was the foundation of the note, and the manner in which it has been increased to its present amount.

These interrogatories the complainant refuses to answer, for the reason, as he alleges, that he is informed by counsel that he is not bound to make answer. This answer is excepted to.

HITCHCOCK, J. The facts in this case, show that the defendant, Anna Parker, has the oldest mortgage upon the premises in controversy, that mortgage bearing date the 18th of July, 1840, but it was not recorded until the 11th day of November following. Before this time, to wit, on the 30th day of October of the same year, the complainant had procured a mortgage of the same premises, which was entered for record on the day of its date.

Now, there can be no doubt that, under these circumstances, at law, the mortgage of the complainant is the preferable lien upon this land. The 7th section of the Act expressly declares that mortgages "shall take effect from the time when they are recorded; and if two mortgages are presented for record on the same day, they shall take effect from the order of presentation for record; the first presented, shall be the first recorded." — And if they take effect from such time, they surely could have had no effect before. It is claimed, however, that before recording a mortgage, although, in form, a legal mortgage, it "takes effect" as an equitable mortgage, and that a subsequent mortgage, with notice of this previous mortgage, will be postponed in equity. This question was before the court at the last term, in the case of *Stansel v. Roberts* and others (13 Ohio Rep. 148), and it was decided that the lien of a second mortgage, first recorded, is preferred; that notice of a prior unrecorded mortgage will not, under the Ohio Statute, postpone the second mortgage, and that it does not make any difference that the first mortgage was given to secure money borrowed to pay for the land.

I am aware that this construction of the Statute is not entirely

satisfactory to the profession, as the law thus construed interferes with previous received opinions of equity principles, as applicable to the subject. But it is not perceived how a different construction would have been put upon the Statute, by any rule of construction known in law. Mortgages "shall take effect from the time they are recorded," or, according to a subsequent Statute, from the time when entered or delivered for record. There is no ambiguity, no uncertainty, in the phraseology. It is plain and explicit. Not that it shall take effect at law, but that it shall take effect from that time. It is the delivery of the instrument to the proper officer, or at the proper office, for registry, that gives it vitality. There is no more impropriety in this legislation than there is in saying that a deed for the conveyance of land, although otherwise executed according to the forms of the law, shall not operate even as between the parties as a conveyance, until acknowledged before competent authority; yet such is our law; and it is held that such deed can, until acknowledged, be treated in no other manner than as contracts to convey.

The opinion that it was the intention of the Legislature that a mortgage should be recorded in order to give it vitality, is, as it seems to the court, perfectly apparent, from an examination of the different laws providing for the execution and acknowledgment of deeds. The fourth section of the Act of January 30th, 1818 (Chase Stat. 1041), "to provide for the proof and acknowledgment of deeds and other instruments of writing," provides, "that all deeds, mortgages, and other instruments of writing, executed agreeably to the first and second sections of this Act, shall be recorded within six months from the date of the same, within the county wherein such lands, tenements, and hereditaments are situate; and all deeds, mortgages, and other instruments of writing, executed agreeably to the third section of this Act, shall be recorded within six months from the date of the same, within the county wherein such lands, tenements, and hereditaments shall lie; and all such deeds, mortgages, and other instruments of writing, executed, acknowledged, or proved, and recorded as aforesaid, shall be good and valid in law; and if any deed, mortgage, or other instrument of writing, as aforesaid, shall not be recorded within the time limited, as aforesaid, such deed, mortgage, or other instrument of writing, shall be considered fraudulent against any subsequent *bona fide* purchaser or purchasers, without knowledge of the existence of such conveyance; provided, that such conveyance may be recorded after the expiration of the time herein required, and shall, from the date of the record, be notice to any subsequent purchaser or purchasers."

The first and second sections of this Act relate to deeds executed within, the third, to deeds executed without, the State. Previous to this Act, one year was allowed for recording deeds of the latter description.

By this section it will be seen that unrecorded deeds, mortgages,

and other instruments, were good as against subsequent grantees with notice.

This Act was repealed by an Act of the same title, passed February 24th, 1820. The fourth section of this Act, however, is substantially, if not identically, the same with the 7th section of the Act of 1818 (Ch. Stat. 1149); and it will be observed that, as to recording, and the effect thereof, mortgages are placed precisely on the same footing with other deeds of conveyance.

The last-named Act was repealed by the Act of 1831, the law now in force. By this latter law, a difference is made between mortgages and other deeds of conveyance. The 7th section provides, "that all mortgages, executed agreeably to the provisions of this Act, shall be recorded in the office of the recorder in the county in which such mortgaged premises are situated, and shall take effect from the time when the same are recorded; and if two or more mortgages are presented for record on the same day, the first presented shall be first recorded, and the first recorded shall have preference."

Then follows, in section seven, "that all other deeds and instruments of writing, for the conveyance, or *encumbrance* of any lands, tenements, or hereditaments, executed agreeably to the foregoing provisions, shall be so recorded, within six months from the date thereof; and if such deed or other instrument of writing, shall not be so recorded within the time herein prescribed, the same shall be deemed fraudulent, so far as relates to any subsequent *bona fide* purchaser, having, at the time of making such purchase, no knowledge of the existence of such former deed or other instrument of writing, and may be recorded after the expiration of the time herein prescribed; and from the date of such record, shall be notice to any subsequent purchaser."

It will be seen that, by this last legislation, mortgages and other instruments of writing, which before had been provided for in one section, are separated. Deeds of conveyance, other than mortgages, may be recorded within six months; but the principle is retained, that although not recorded, yet a subsequent purchaser, with notice, cannot defeat the title of the grantee. The same principle had prevailed with respect to mortgages until this time. But, by this law, no time is specified within which they shall be recorded; that is at the election of the mortgagee. It is prescribed, however, that they shall take effect from the time of recording. What means all this? Was it done without design, through mere carelessness, or want of attention? It is evident that a change in the law was intended. It was thought that there was some mischief in the previous law, and the object was to supply a remedy; and that mischief was, as we must suppose, from the course of legislation, that a man might take a mortgage of his neighbor's property, and keep it concealed for six months, thereby enabling that neighbor to contract further debts, which he would be unable to pay, and thereby defraud the commun-

ity around him. To remedy evils of this character, the law-making power thought it good policy to provide that this species of conveyance should only take effect from the time of recording — from the time that notice was given of the encumbrance upon the public records of the county. Whether the policy was sound or not, is not for us to say. It is sufficient for us to know that such is the policy. But we, in fact, believe that the policy is good, and if persevered in, will tend to prevent, and actually will prevent, frauds. We have no doubt that, under this construction, frauds may be practised and hard cases arise. The case before the court is a hard one. Anna Parker sold her land, and took a mortgage to secure the purchase money; she neglected to place this mortgage upon record. She may, in consequence, lose the debt, but it will not do to bend the law to prevent its operation against her.

But, as between ordinary mortgages, I cannot perceive how this construction can operate improperly. I know it is said that a subsequent mortgagee, with notice, defrauds the prior mortgagee by putting his mortgage first upon record. In one sense of the word, perhaps he does, but there is no actual fraud. Take an instance: A. and B. are creditors of C.; the debts are equal, and either is sufficient to sweep away the entire property of the debtor; A. seeks his opportunity, and for the security of his debt, procures a mortgage upon the entire property of C.; when he does it, he knows of the debt of B., and knows, further, that his mortgage will entirely defeat the collection of that debt. Now, in the common acceptation of the term, and according to the ideas of the profession, here is no fraud. True, B. is deprived of the collection of his debt, but there is no fraud. A. is the vigilant creditor; he only took the mortgage to secure what was honestly his due. But change the case: A. after having procured his mortgage, becomes negligent, he does not place it upon record; B., knowing the existence of that mortgage, but equally anxious to secure his debt, procures a mortgage, and places it upon record. All cry out, here is a fraud. Now, my perceptions are so obtuse, that I can perceive no difference, in a moral point of view, in the actions of these two men. They are both creditors, and both equally anxious to secure their debts. They pursue the course pointed out by law to effect their object. The one is the most vigilant to get his mortgage executed: the other, to get his recorded. The course of neither is in accordance with the principles of abstract justice. Such justice would require that, inasmuch as the property was not sufficient to pay both, it should be equally divided between them.

It is attempted, in this case, to set up the vendor's lien for the protection of Mrs. Parker. This can be done only where it appears that the vendor relied upon this lien as security for the payment of the purchase money. In this case, a note, with personal security, was given for the purchase money in the first instance, and subsequently a mortgage.

It is urged by counsel, that although as between mortgages, the first recorded mortgage must prevail, yet that an unrecorded mortgage, being in equity a specific lien, must prevail as against a prior judgment lien, which is general. If we are right in the construction of the Statute, if a mortgage does not take effect until recorded, in other words, if the recording is part and parcel of the execution, it is difficult to see how this position can be sustained. If, as we suppose, the leading motive of the Legislature, in the enactment of the law, was to have encumbrance upon land placed upon the record of the county, to adopt the principle insisted upon, would be to defeat that intention. The case of *Lake v. Doud*, 10 Ohio Rep. 415, is cited in support of the position assumed by defendant's counsel. In that case, there was no judgment lien. The judgment had been rendered in a county different from the one in which the land in controversy was situated. But execution had been levied upon the land in controversy, and it had been sold. The purchaser did not set up any claim against the mortgage. The great question in the case was a question of fraud, and the court found, not that there was constructive fraud, but that an actual and aggravated fraud had been attempted upon the rights of the complainants. The question was made by defendants, whether the deed of the complainant would be enforced, not being a legal mortgage; and the court held that it could, and cited, as authority, the case of the *Bank of Muskingum v. Carpenter*, 7 Ohio Rep. 21. The case in 7th Ohio was undoubtedly correctly decided, but the mortgage in controversy, in that case, was executed long before the Act of 1831.

In the case of *Lake v. Doud*, this latter Act was scarcely taken into consideration by the court. The great, the leading question, as before stated, being the question of fraud.

The case of *Magee v. Bell, Administrator of Beatty*, 8 Ohio Rep. 396, was one in which the question as to priority of lien was raised. The plaintiff was a judgment creditor of Thos. T. Beatty; the intestate was a creditor whose debt was secured by mortgage. The mortgage was delivered for record, before the first day of the term, when the judgment was entered, but was not copied into the record until afterwards. When the case was first under consideration, the question was, whether the mortgage should take effect from the time of its delivery for record, or from the time it was actually copied into the record. If from the time of delivery for record, the mortgage in the case then before the court, was to be preferred to the judgment. If from the time it was actually copied into the record, then the lien of the judgment was the preferable lien. Upon this question, the court divided in opinion, and this division of opinion induced the Legislature to pass the declaratory Act of March, 1838. In that case, it is evident that the court considered that the lien of a judgment must be preferred to any lien of an unrecorded mortgage.

Upon the whole, the court are of opinion that the judgment of

Kagler is the preferable lien upon the one hundred acres of land, and that the mortgage of the complainant must be preferred to that of Anna Parker. As we suppose the case was reserved for the purpose of settling this point, we shall not now enter a final decree, nor order a sale of the mortgaged premises; but the case will be referred to a master, to ascertain the amount due upon the respective liens, with instructions to report at the next term of the court in Clermont County.

In making this inquiry, the master will examine the complainant on oath, touching the consideration of the debt secured by his mortgage. In the answer of Anna Parker, she charges that much of the consideration of this note is exorbitant interest, such exorbitant interest being compounded; and she calls upon complainant, by interrogatories, to answer this charge. This he refuses to do, and, as he says, under the advice of counsel, that he is not obliged to do it. We differ from counsel on this point; the interrogatories must be answered, or what will result in the same thing, the complainant must answer on oath before the master.¹

POMROY v. STEVENS.

11 Met. (Mass.) 244. 1846.

WRIT OF ENTRY to recover forty-three acres of land in Hancock. At the trial before *Shaw*, C. J., both parties claimed title to the demanded premises under Hiram Chapman. The demandant claimed under a levy upon the premises, made on the 8th of November, 1842, upon an execution against said Chapman, in pursuance of an attachment alleged to have been made on the 6th of December, 1841. The tenant claimed under a deed of the premises, made to him by said Chapman, on the 4th day of February, 1839, acknowledged on the same day, and recorded on the 10th of December, 1842.

Several objections (which need not be here stated) were made to the legality and sufficiency of the demandant's said levy, which were overruled by the judge.

An objection was then made to the demandant's attachment of the demanded premises, on the ground of a discrepancy between the officer's return thereof on the original writ and his return on the copy deposited in the clerk's office and entered in the clerk's book, pursuant to Rev. Sts. c. 90, §§ 28-30. The attachment on the writ purported to be made on the 7th of December, 1841, whereas, on said copy, it was stated to be on the 6th of said December. The judge ruled, *first*, that this slight misdescription of the attachment did not raise a doubt of its identity, nor affect any one's rights; and *secondly*,

¹ See *Bercaw v. Cockerill*, 20 Ohio St. 163; 2 Jones, Real Prop., § 1501.

that, as the tenant did not claim under any subsequent conveyance or attachment, by the terms of the Statute he could not take advantage of such misdescription.

The defence was, that the demandant, when he made his levy, and when he made his attachment, had actual notice of the tenant's prior unrecorded deed. In support of this defence, the tenant offered evidence to show that he was in the open occupation and possession of the demanded premises; that he pastured part thereof, and cultivated other parts thereof; and that this was so open and visible as to warrant a belief that the demandant knew it. This evidence was objected to as incompetent, having no tendency to prove knowledge of a pre-existing title by deed, rather than a tenancy for years or at will. Whereupon the judge ruled, that such acts of occupation and improvement were not competent evidence, unless connected with some admission or declaration of the demandant, showing that he attributed such acts to the existence of a previous conveyance.

The tenant then proposed to prove some improvements of a more expensive and permanent character, such as an owner only would be likely to make; and for this purpose he offered to prove that he joined with a neighbor who had purchased another part of said Hiram Chapman's land, and put his deed on record, in building a partition rail fence, of considerable extent. But the judge ruled, that such fencing fell under the rule before stated, in regard to possession, occupation, and improvement, and had no tendency to prove a pre-existing deed.

The tenant's counsel declined going to the jury upon the question of fact, and consented to a verdict for the demandant, subject to the opinion of the whole court upon the rulings at the trial.

WILDE, J. The parties in this case both claim their titles under Hiram Chapman; and the general question is, which party has the better title.

The tenant claims under a deed dated February 4th, 1839, acknowledged the same day, but not recorded until the 10th of December, 1842. The demandant claims under a levy of an execution, alleged to have been made on the 8th of November, 1842, in pursuance of an attachment alleged to have been made on the 6th of December, 1841.

Several objections were taken, at the trial, to the legality of the demandant's levy; but they were all overruled, and no exceptions were taken to the ruling of the court in this respect. An objection was also made to the validity of the attachment, on the ground that in the copy left at the clerk's office there was a misdescription as to the day when the attachment was made; the attachment purporting to have been made on the 7th of December, and in the clerk's book it was stated to be on the 6th of December. But this objection is immaterial, as the tenant was a *previous* purchaser, and could not have been prejudiced by this slight mistake. The Rev. Sts. c. 90, § 28, provide that "no attachment of real estate, on mesne process,

shall be valid against any subsequent attaching creditor, or against any person who shall afterwards purchase the same," &c. "unless the original writ or a copy thereof, and so much of the officer's return thereon as relates to the attachment of such estate, shall be deposited in the office of the clerk of the court," &c. This provision is made for the benefit of *subsequent* purchasers and attaching creditors, and by them only can advantage be taken of any non-compliance therewith.

The remaining objection to the demandant's title is that on which the tenant principally relies. He contends, that at the time of the demandant's attachment and the levy of his execution, the demandant had actual notice of the tenant's prior title; and he offered evidence to prove that, before the attachment, he was in the open and visible possession of the demanded premises, cultivating the same, and making improvements of a permanent character thereon; and he contended that this was competent and sufficient evidence to warrant the jury in finding that the demandant had actual notice of the tenant's title. But the presiding judge was of a different opinion, and ruled accordingly. Whether the demandant had notice of the tenant's title or not, was a question of fact for the jury to decide. But the competency and sufficiency of the evidence to prove the fact were within the province of the court to determine; and we are all of opinion that the ruling of the presiding judge on this point was well founded.

Before the Rev. Sts. c. 59, § 28, the open and notorious possession and improvement of real estate, by a party entering under a deed not registered, was, in general, sufficient evidence from which notice of such deed might be inferred or implied, so as to avoid a subsequent deed or attachment. But to have that effect, the evidence must have been such as to render the inference not merely probable, but necessary and unquestionable. *M'Mechan v. Griffing*, 3 Pick. 149. But since the Rev. Sts. c. 59, § 28, no implied or constructive notice of an unregistered deed can avoid a subsequent deed or attachment. The Statute expressly provides that no conveyance of real estate shall be valid and effectual, against any person other than the grantor and his heirs and devisees, and persons having actual notice thereof, unless it is made by a deed recorded as the Statute directs. Since this provision, no implied or constructive notice of an unregistered deed will give it validity against a subsequent purchaser or attaching creditor. It is not sufficient to prove facts that would reasonably put him on inquiry. He is not bound to inquire; but the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, must prove that the latter had actual notice or knowledge of such deed. The evidence offered was clearly insufficient to prove any such notice or knowledge. A tenant for years, or at will, may have possession of real estate, and may build fences, and make other improvements thereon; or a party may have possession, and make improvements, without any title by deed or by lease.

The evidence of such possession and improvements is wholly insufficient to prove that the party in possession holds under a conveyance to him in fee simple. The evidence offered, therefore, would not have warranted the inference that the demandant had any notice or knowledge of the tenant's title-deed.

*Judgment on the verdict.*¹

KIRBY v. TALLMADGE.

160 U. S. 379. 1895.

THIS was a bill in equity filed by Maria E. Tallmadge against the appellants, to set aside and remove, as a cloud upon her title, a deed made by the appellants Richard H. Miller, Elizabeth Houchens, and Ella A. Goudy, claiming to be heirs at law of one John L. Miller, deceased, dated August 30, 1888, and purporting to convey to the appellant Kirby the property therein described. The bill further prayed for the cancellation of a trust deed executed by the appellant Kirby and his wife to the defendants Willoughby and Williamson, and for an injunction against all the defendants except Kirby, restraining them from negotiating certain notes given by Kirby for the purchase of said lots, etc.

The facts disclosed by the testimony show that, in 1882, Mrs. Tallmadge, the appellee, purchased of one Bates, for a home, lots Nos. 77 and 78, in square 239, in the city of Washington, with the improvements thereon, for the sum of ten thousand dollars, five thousand of which were paid in cash, the residue to be paid in five instalments of one thousand dollars each. Instead of taking the title to the property in herself, she furnished the money to John L. Miller, a friend of the family, who paid the \$5000 cash, with the money thus furnished, and at her request took the title in his own name, and executed notes for the deferred payments, which he secured by a deed of trust upon the property. Subsequently, and in June, 1883, Miller also purchased with the funds of Mrs. Tallmadge the adjoining lot No. 76, taking title in his own name, and executing a deed of trust for the deferred payments, amounting to \$1266.

Mrs. Tallmadge took immediate possession of the premises, and had occupied them as her own from that day to the time the bill was filed, paying taxes, improvements, and interest on incumbrances, reducing the principal \$2266, and holding open and notorious possession under her claim of title.

Mr. Miller, who claimed no title or right to the premises in himself, on December 27, 1883, by a deed signed by himself and wife,

¹ Compare *Toupin v. Peabody*, 162 Mass. 573; *Savannah Timber Co. v. Deer Island Co.*, 258 F. R. 777, 782.

conveyed the legal title to Mrs. Tallmadge, but this deed, through inadvertence or otherwise, was not recorded until October 4, 1888. Mr. Miller died in February, 1888, and by his will, which was dated December 1, 1880, devised his estate to his widow.

On June 16, 1888, defendants Miller, Houchens, and Goudy, collateral heirs of John L. Miller, who had made a contract with the defendants Willoughby and Williamson to give them one quarter of whatever they could get for them out of the estate of Miller, filed a bill in the Supreme Court of the District against the widow and executor of Miller, the holders of the notes given by him, and the trustees in one of the deeds of trust, praying for a partition or sale of the property, the admeasurement of the widow's dower, and for a charge upon the personal estate of Miller for the unpaid purchase money of the property.

To this bill the widow of John L. Miller made answer that her husband never had any interest in the property in question; that the title was taken in his name for Mrs. Tallmadge; and that long before his death he had by deed duly conveyed it to her, and that neither she nor his estate had or had ever had any interest in the property. In August, 1888, the pendency of this suit coming to the knowledge of Mrs. Tallmadge, she sent the original deed from Miller to her, then unrecorded, by Mr. Tallmadge to Willoughby and Williamson, solicitors for Miller's heirs, who examined and made minutes from it.

On August 30, 1888, Houchens, Goudy, and Miller, who had filed the bill for partition, executed a deed conveying the property to the appellant Kirby, subject to the dower rights of Mrs. Miller, for a consideration of \$12,000, \$3000 of which were said to have been paid in cash and \$9000 by notes secured by a mortgage or trust deed upon the property, to Willoughby and Williamson as trustees. Kirby thereupon claimed the property as an innocent purchaser without notice of the prior deed. He at once gave notice to Mr. Tallmadge that he would demand rent for the property at the rate of \$1000 per annum.

On receipt of this notice Mrs. Tallmadge filed this bill to cancel and set aside the deed and deed of trust. Answers were filed by the defendants and testimony taken by the plaintiff, tending to show the facts alleged in her bill. Neither of the appellants took proof, nor did they or either of them offer themselves as witnesses, but stood upon their answers.

Upon final hearing, the court below, in special term, rendered a decree in accordance with the prayer of the bill, setting aside the deed and deed of trust as fraudulent and void, from which decree defendants appealed to the General Term, which affirmed the decree of the court below, and further directed that Miller, on the demand of Kirby, return to him the \$3000 which Kirby claimed to have paid, and which Miller admitted to have received.

From this decree defendants appealed to this court.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

The controversy in this case arises from the fact that the deed from John L. Miller to Mrs. Tallmadge, which was given December 27, 1883, was not put upon record until October 4, 1888. In the meantime, and in February, 1888, Miller, in whose name the property had been taken for the benefit of Mrs. Tallmadge, died; and on August 30, 1888, Houchens, Goudy, and Richard Henry Miller, collateral heirs of John L. Miller, executed a deed of the property, subject to the dower rights of Miller's widow, to defendant Kirby for an expressed consideration of \$12,000, of which \$3000 are said to have been paid down in cash, and \$9000 in notes, payable to Willoughby and Williamson. Kirby now claims to be an innocent purchaser of the property, without notice of the prior deed from John L. Miller to Mrs. Tallmadge.

There are several circumstances in this case which tend to arouse a suspicion that Kirby's purchase of the property was not made in good faith. Within three months after the probate of the will of John L. Miller, his collateral heirs, Houchens, Goudy, and Richard H. Miller, who had made a contract with Willoughby and Williamson to give them one quarter of whatever they could get for them out of the estate of Miller, filed a bill for the partition of real estate, and to set off the widow's dower. His widow, Lola, answered, admitted that her husband did not purchase the lands described in the bill, and alleged that he had conveyed them away in his lifetime.

Mrs. Tallmadge, hearing of this suit, instead of appearing formally therein, submitted her deed from Miller to the solicitors for the complainants in the partition suit, who did not amend their bill or make her a party, but apparently allowed the suit to drop; inasmuch as the complainants, being heirs of John L. Miller, took only his actual interest in the land, of which, owing to his deed to Mrs. Tallmadge in his lifetime, nothing remained at his death. Shortly thereafter, the complainants in that suit, who must have been well aware that they had no title to the property, executed a deed to Kirby of all their interest in the land for a consideration of \$12,000, subject to the dower right of Mrs. Miller, the debts of John L. Miller, and so much of the notes of \$5000 as were unpaid, after applying his personal estate. Kirby alleges in his answer that he examined the premises twice and approached the house, but never seems to have entered it, and apparently took up with the first proposition made to him to buy it, without any of the bargaining that usually precedes the consummation of a sale of property of that value. While he avers in his answer, and Miller admits, the payment of \$3000 in cash, defendants introduced no testimony whatever in support of their case, but relied solely upon their answers. As they had

it in their power to explain the suspicious circumstances connected with the transaction, we regard their failure to do so as a proper subject of comment. "All evidence," said Lord Mansfield in *Blatch v. Archer*, (Cowper, 63, 65,) "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. *McDonough v. O'Niel*, 113 Mass. 92; *Commonwealth v. Webster*, 5 Cush. 295, 316. It is said by Mr. Starkie, in his work on Evidence, vol. 1, p. 54: "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

But the decisive answer to the case of *bona fide* purchase made by the defendant Kirby is, that Mrs. Tallmadge had, ever since the original purchase of the land by Miller in 1882, been in the open, notorious, and continued possession of the property, occupying it as a home. The law is perfectly well settled, both in England and in this country, except perhaps in some of the New England States, that such possession, under apparent claim of ownership, is notice to purchasers of whatever interest the person actually in possession has in the fee, whether such interest be legal or equitable in its nature, and of all facts which the proposed purchaser might have learned by due inquiry. 2 Pomeroy's Eq. Juris. § 614; Wade on Notice, § 273. The same principle was adopted by this court in *Landes v. Brandt*, 10 How. 348, 375, in which it was held that "open and notorious occupation and adverse holding by the first purchaser, when the second deed is taken, is in itself sufficient to warrant a jury or court in finding that the purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under; and that he, the subsequent purchaser, was bound by that title, aside from all other evidence of such possession and holding." The principle has been steadily adhered to in subsequent decisions. *Lea v. Polk County Copper Co.*, 21 How. 493, 498; *Hughes v. United States*, 4 Wall. 232, 236; *Noyes v. Hall*, 97 U. S. 34; *McLean v. Clapp*, 141 U. S. 429, 436; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417.¹

Defendants' reply to this proposition is that the occupancy in this case, being that of a husband and wife, is by law referable to the husband alone as the head of the family; that the purchaser was not bound by any notice, except such as arose from the possession

¹ See 3 Devlin, Deeds, 3d ed., §§ 760-764.

Compare *Slinger v. Sterrett*, 283 Ill. 82; *Jones v. Nichols*, 280 Mo. 653.

of the husband, and that, as he had no title to the property, Kirby was not bound to ascertain whether other members of the family had title or not. There are undoubtedly cases holding that occupation by some other person than the one holding the unrecorded deed, is no notice of title in such third person, and that the apparent possession of premises by the head of a family is no notice of a title in a mere boarder, lodger, or subordinate member of such family, or of a secret agreement between the head of a family and another person. As was said by this court in *Townsend v. Little*, 109 U. S. 504, 511: "Where possession is relied upon as giving constructive notice it must be open and unambiguous, and not liable to be misunderstood or misconstrued. It must be sufficiently distinct and unequivocal, so as to put the purchaser on his guard." In this case one James Townsend bought and took possession of a public house in Salt Lake City, and lived in it with his lawful wife and a plural or polygamous wife, the latter, who was the appellant, taking an active part in conducting the business of the hotel. He subsequently ceased to maintain relations with the appellant as his polygamous wife, but, being desirous of having the benefit of her services, both concealed this fact. He made a secret agreement with her that if she would thus remain, she should have a half interest in the property. He afterwards acquired his legal title to the property without a disclosure of the secret agreement. His interest therein having subsequently passed into the hands of innocent third parties for value without notice of appellant's claim under the secret agreement, it was held that the joint-occupation of the premises by herself and Townsend, under the circumstances, was not a constructive notice of her claim, and that she had no rights in the premises as against a *bona fide* purchaser without notice. There were evidently two substantial reasons why appellant's possession was not notice of her rights. First, James Townsend took the legal title to himself in 1873; and held it until 1878, when the purchase was made; and, second, his agreement with the appellant was not one with his lawful but his polygamous wife, and was also a secret one. The case is obviously not one of a joint occupation by a husband and his lawful wife, neither of them having any title thereto.

In the case of *Thomas v. Kennedy*, 24 Iowa, 397, it was held that, where real estate is ostensibly as much in the possession of the husband as the wife, there is no such actual possession by the wife as will impart notice of an equitable interest possessed by her in the land, to a purchaser at execution sale *under a judgment against her husband*, in whom the legal title apparently was at the time of the rendition of the judgment. This case is also a mere application of the rule that, if there be any title to the land in one who is in possession of it, the possession will be referred to that title, or, as said in 2 Pomeroy's Eq. § 616: "Where a title under which the occupant holds has been put on record, and his possession is con-

sistent with what thus appears of record, it shall not be a constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, but has had no actual notice beyond what is thereby disclosed." That the court did not intend to hold that a joint occupation by a husband and wife is in no case notice of more than the occupation of the husband, is evident from the subsequent case of the *Iowa Loan and Trust Co. v. King*, 58 Iowa, 598, in which the court said: "It cannot, we think, be doubted that possession of real property by a husband and wife together, will impart notice of the wife's equities as against all persons other than those claiming under the husband, their possession being regarded as joint by reason of the family relation." In this case the occupation was by a husband and wife, and it was held that such possession was notice of a title in the wife to a life estate in the property as against the holder of a mortgage given by a son, who was a member of the family as a boarder, lodging a part of the time in his mother's house, and a part of the time elsewhere—the legal title being in the son.

In the case of *Lindley v. Martindale*, 78 Iowa, 379, the title to the lands was in a son of the plaintiff, who resided on a portion of them, while plaintiff and her husband resided on another portion. The lands had for a long time been cared for either by the husband or the son, and it was held that one who, upon being told that the title was in the son, took a mortgage from him to secure a loan, which was used for the most part to pay off prior incumbrances placed on the land by the son, was not charged with the alleged equities of plaintiff by reason of her claimed possession of the land, the court holding that her possession was not such as the law requires to impart notice. The case is not entirely reconcilable with the last.

In *Harris v. McIntyre*, 118 Illinois, 275, a widow furnished her bachelor brother money with which to buy a farm for their joint use, the title to be taken to each in proportion to the sum advanced by them, respectively. He, however, took a conveyance of the entire estate to himself, and they both moved upon the place, he managing the land, and she attending to the household duties. The deed was recorded, and he borrowed money, mortgaged the land to secure the loan, and appeared to the world as the owner for a period of over ten years, during which time the sister took no steps to have her equitable rights enforced or asserted. It was held that her possession, under such circumstances, was not such as would charge a subsequent purchaser from her brother with notice of her equitable rights. Here, too, the record title was strictly consistent with the possession.

In *Rankin v. Coar*, 46 N. J. Eq. 566, 572, a widow, who occupied part of a house in which she was entitled to dower, while her son the sole heir at law, occupied the rest of the house, released her dower therein to her son by deed duly recorded. It was held

her continued occupation thereafter would not give notice to one who took a mortgage from the son, of a title in her to a part of the house occupied by her, acquired by an unrecorded deed to her from her son contemporaneous with her release of dower. "Possession," said the court, "to give notice or to make inquiry a duty, must be open, notorious, and unequivocal. There must be such an occupation of the premises as a man of ordinary prudence, treating for the acquisition of some interest therein, would observe, and, observing would perceive to be inconsistent with the right of him with whom he was treating, and so be led to inquiry."

So in *Atwood v. Bearss*, 47 Mich. 72, the title to property upon the record appeared to be in the wife. Her husband's previous occupation had been under her ownership, and in right of the marital relation, and nothing had transpired to suggest that she had made the property over to him. She had, however, given him a deed, which was not upon record. It was held that his continuance in possession was no notice of this deed, since it was obviously consistent with the previous title in herself.

Indeed, there can be no doubt whatever of the proposition that, where the land is occupied by two persons, as for instance, by husband and wife, and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other. In such case, the purchaser finding title in one, would be thrown off his guard with respect to the title of the other. The rule is universal that if the possession be consistent with the record title, it is no notice of an unrecorded title.¹ But, where the land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom has title by record, we think that in view of the frequency with which homestead property is taken in the name of the wife, the proposed purchaser is bound to make some inquiry as to their title.

The case of *Phelan v. Brady*, 119 N. Y. 587, is an instance of this. In this case a suit was brought to foreclose a mortgage upon certain premises, given by one Murphy, who held an apparently perfect record title to the property. It appeared, however, that before the execution of the mortgage, Murphy had conveyed the premises to one Margaret Brady, who was in possession, and with her husband occupied two rooms in the building on the premises. She also kept a liquor store in a part thereof. The other rooms she leased to various tenants, claiming to be the owner and collecting the rents. Her deed was not recorded until after the giving of the mortgage. It was held that her actual possession under her deed, although unrecorded and its existence unknown to plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. This

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said ¹ See *Schumacher v. Truman*, 134 Cal. 430; *Porter v. Johnson*, 172 Cal. 457; *May v. Sturdivant*, 75 Iowa 116.

case goes much farther than is necessary to justify the court in holding that Mrs. Tallmadge's possession was notice in the case under consideration, as the actual occupation of the wife was only of two rooms in a tenement house containing forty-three apartments.

If there be any force at all in the general rule that the possession of another than the grantor, puts the purchaser upon inquiry as to the nature of such possession, it applies with peculiar cogency to a case like the present, where the slightest inquiry, either of the husband or wife, would have revealed the actual facts. Instead of making such inquiry, Kirby turns his back upon every source of information, does not even enter the house, makes no examination as to whether the property was in litigation, and buys it of collateral heirs of Miller, subject to his widow's dower if he had had the title, to an unpaid mortgage, and to the chances of the property being required for the payment of Miller's debts. It is clear that a purchase made under such circumstances does not clothe the vendee with the rights of a *bona fide* purchaser without notice.

We see no reason for impeaching the original purchase of the land by Mrs. Tallmadge. Her account of the transaction is supported by the testimony of all the witnesses, as well as by the receipts and other documentary evidence. Her failure to cause the deed to be recorded is not an unusual piece of carelessness, nor is it an infrequent cause of litigation. Under the circumstances of the case, it raises no presumption of fraud. What motives she may have had for taking the title to the property in the name of Mr. Miller is entirely immaterial to the present controversy, although it appears from her testimony that she was possessed of money in her own right, and took this method of investing it.

The decree of the court below is, therefore,

Affirmed.

OSTERGARD v. NORKER ET AL.

102 Neb. 675. 1918.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

CORNISH, J. Plaintiff was induced by fraud and without consideration to make her deed of the land in controversy to the defendant Norker. Soon afterwards the defendant Norker deeded the land to defendant Harvey. At the time of these conveyances the plaintiff was in actual and visible possession of the premises by her tenant. She never surrendered the possession, nor consented that possession be given to either of the defendants. Harvey, at the time of his purchase, made no inquiry of the tenant or plaintiff respecting plaintiff's rights. This action seeks the cancelation of these conveyances. The trial court found that defendant Harvey purchased without

knowledge of the fraud perpetrated upon the plaintiff; but further found that he was not a *bona fide* purchaser, for the reason that he had constructive notice of plaintiff's rights and interest in the land, and entered judgment and decree accordingly. Defendant Harvey appeals.

The inquiry is whether the possession of land under such circumstances is notice of the title of the possessor alone, or whether the possession of the tenant is the possession of the landlord and notice of the former is notice of the latter. In a majority of the American cases the latter rule has been adopted (see note to *Garbutt & Donovan v. Mayo*, 128 Ga. 269, 13 L. R. A. n. s. 58, 101, 102), and has been recognized by this court (*Conlee v. McDowell*, 15 Neb. 184; *Smith v. Myers*, 56 Neb. 503). It is an equitable rule that possession of property is notice to the world of whatever rights the possessor has in it. The fact that the possession is by a tenant under circumstances such as in this case should make no difference. If Harvey had inquired of the tenant, he would have learned that he held as lessee of another. Exercising reasonable prudence, he would not have stopped his inquiry at that point, but would have inquired of the landlord (Mrs. Ostergard) and would have learned, as he afterwards did learn, that she was unwilling to surrender possession and claimed ownership of the land.

Defendant Harvey in his brief raises a question of estoppel, which was neither pleaded nor litigated in the trial court and cannot be considered here.

We are of opinion that the judgment and decree of the trial court should be *Affirmed.*¹

SEDGWICK, J., not sitting.

WILLIAMSON v. BROWN

15 N. Y. 354. 1857.

THE defendant, Brown, was the owner of fifty acres of land in Hannibal, Oswego County, which, on the 4th of April, 1851, he sold and conveyed to one Jackson Earl, taking back from Earl a mortgage for \$800 of the purchase money, but omitting at that time to put his mortgage upon record.

On the 29th of October, 1851, Earl conveyed the land to the plaintiff by deed, which was duly recorded on the same day; and on the 28th of January, 1852, the mortgage from Earl to the defendant was put upon record. In May following the defendant commenced proceedings for the foreclosure of the mortgage by advertisement. This

¹ See *Frye v. Rose*, 120 Miss. 778; *Caplan v. Palace Realty Co.*, 110 Atl. (N. J.) 584; *McClung Co. v. City Realty Co.*, 108 Atl. (N. J.) 767, 111 Atl. (N. J.) 926; *Telford v. Ring*, 79 Okla. 92.

suit was commenced to restrain the defendant from proceeding with this foreclosure, on the ground that the plaintiff was protected by the Recording Act against the defendant's prior but unrecorded mortgage.

The cause was tried before a referee, who reported that he found as matter of fact "that the plaintiff did not at the time he purchased the premises have actual notice of the existence of the mortgage mentioned in the pleadings, given by Jackson Earl to the defendant," but also found that he had "sufficient information, or belief of the existence of said mortgage to put him upon inquiry, before he purchased and received his conveyance of the premises in question; and that he pursued such inquiry to the extent of his information and belief, as to the existence of the said mortgage, and did not find that such mortgage existed, or had been given."

Upon these facts the referee held that the plaintiff was chargeable with notice of the mortgage, and dismissed the complaint, and the plaintiff excepted to the decision. Judgment was entered for the defendant upon the referee's report, which upon appeal to the General Term of the Fifth District, was affirmed.

SELDEN, J. The referee's report is conclusive as to the facts. It states, in substance, that the plaintiff had sufficient information to put him upon inquiry as to the defendant's mortgage; but that after making all the inquiry, which upon such information it became his duty to make, he failed to discover that any such mortgage existed. This being, as I think, what the referee intended to state, is to be assumed as the true interpretation of his report.

The question in the case, therefore, is as to the nature and effect of that kind of notice so frequently mentioned as notice sufficient to put a party upon inquiry. The counsel for the plaintiff contends that while such a notice may be all that is required in some cases of equitable cognizance, it is not sufficient in cases arising under the Registry Acts, to charge the party claiming under a recorded title with knowledge of a prior unregistered conveyance. He cites several authorities in support of this position.

In the case of *Dey v. Dunham*, 2 John. Ch. R. 182, Chancellor Kent says, in regard to notice under the Registry Act: "If notice that is to put a party upon inquiry be sufficient to break in upon the policy and the express provisions of the Act, then indeed, the conclusion would be different; but I do not apprehend that the decisions go that length." Again, in his Commentaries, speaking on the same subject, he says: "Implied notice may be equally effectual with direct and positive notice; but then it must not be that notice which is barely sufficient to put a party upon inquiry."

So in *Jackson v. Van Valkenburg*, 8 Cow. 260, Woodworth, J., says: "If these rules be applied to the present case, the notice was defective. It may have answered to put a person on inquiry, in a case where that species of notice is sufficient; but we have seen that to supply the place of registry, the law proceeds a step further."

A reference to some of the earlier decisions under the Registry Acts of England will tend, I think, to explain these remarks, which were probably suggested by those decisions. One of the earliest, if not the first of the English Recording Acts was that of 7 Anne, *ch.* 20. That Act differed from our General Registry Act in one important respect. It did not, in terms require, that the party to be protected by the Act should be a *bona fide* purchaser. Its language was: "And that every such deed or conveyance, that shall at any time after, &c., be made and executed, shall be adjudged fraudulent and void, *against any subsequent purchaser or mortgagee for valuable consideration, unless,*" &c.

The English judges found some difficulty at first in allowing any equity, however strong, to control the explicit terms of the Statute. It was soon seen, however, that adhering to the strict letter of the Act would open the door to the grossest frauds. Courts of equity, therefore, began, but with great caution, to give relief when the fraud was palpable. *Hine v. Dodd*, 2 Atk. 275, was a case in which the complainant sought relief against a mortgage having a preference under the Registry Act, on the ground that the mortgagee had notice. Lord Hardwicke dismissed the bill, but admitted that "apparent fraud, or *clear and undoubted* notice would be a proper ground of relief." Again he said: "There may possibly have been cases of relief upon notice, divested of fraud, but then the proof must be *extremely clear*."

Jolland v. Stainbridge, 3 Ves. 478, is another case in which relief was denied. The Master of the Rolls, however, there says: "I must admit *now* that the registry is not conclusive evidence, but it is equally clear that it must be *satisfactorily proved*, that the person who registers the subsequent deed must have known *exactly* the situation of the persons having the prior deed, and knowing that, registered in order to defraud them of that title."

Chancellor Kent refers to these cases in *Dey v. Dunham* (*supra*), and his remarks in that case, as to the effect, under the Registry Acts, of notice sufficient to put a party upon inquiry, were evidently made under the influence of the language of Lord Hardwicke and the Master of the Rolls above quoted.

But the English courts have since seen, that if they recognized any equity founded upon notice to the subsequent purchaser of the prior unregistered conveyance, it became necessarily a mere question of good faith on the part of such purchaser. They now apply, therefore, the same rules in regard to notice, to cases arising under the Registry Acts, as to all other cases.

It will be sufficient to refer to one only among the modern English cases on this subject, viz., *Whitbread v. Boulnois*, 1 You. & Coll. Ex. R. 303. The plaintiff was a London brewer, and supplied Jordan, who was a publican, with beer. It was the common practice with brewers in London to lend money to publicans whom they

supplied with beer, upon a deposit of their title deeds. Jordan had deposited certain deeds with the plaintiff, pursuant to this custom. He afterwards gave to one Boulnois, a wine merchant, a mortgage upon the property covered by the deeds deposited, which was duly recorded. Boulnois had notice of Jordan's debt to the plaintiff, and of the existing custom between brewers and publicans, but he made no inquiry of the brewers. The suit was brought to enforce the equitable mortgage arising from the deposit. Baron Alderson held that the notice to Boulnois was sufficient to make it his duty to inquire as to the existence of the deposit; that his not doing so was evidence of bad faith; and the plaintiff's right, under his equitable mortgage, was sustained. No case could show more strongly that notice which puts the party upon inquiry is sufficient even under the Registry Act.

The cases in our own courts, since *Day v. Dunham* and *Jackson v. Van Valkenburgh* (*supra*), hold substantially the same doctrine. *Tuttle v. Jackson*, 6 Wend. 213; *Jackson v. Post*, 15 Wend. 588; *Grimstone v. Carter*, 3 Paige 421.

I can see no foundation in reason for a distinction between the evidence requisite to establish a want of good faith, in a case arising under the Recording Act, and in any other case; and the authorities here referred to are sufficient to show that no such distinction is recognized, at the present day, by the courts. The question, however, remains, whether this species of notice is absolutely conclusive upon the rights of the parties. The plaintiff's counsel contends, that knowledge sufficient to put the purchaser upon inquiry is only presumptive evidence of actual notice, and may be repelled by showing that the party did inquire with reasonable diligence, but failed to ascertain the existence of the unregistered conveyance; while, on the other hand, it is insisted that notice which makes it the duty of the party to inquire, amounts to constructive notice of the prior conveyance, the law presuming that due inquiry will necessarily lead to its discovery.

The counsel for the defendant cites several authorities in support of his position, and among others the cases of *Tuttle v. Jackson* and *Grimstone v. Carter* (*supra*). In the first of these cases, Walworth, Chancellor, says: "If the subsequent purchaser knows of the unregistered conveyance, at the time of his purchase, he cannot protect himself against that conveyance; and whatever is sufficient to make it his duty to inquire as to the rights of others, is considered legal notice to him of those rights;" and in *Grimstone v. Carter*, the same judge says: "And if the person claiming the prior equity is in the actual possession of the estate, and the purchaser has notice of that fact, it is sufficient to put him on inquiry as to the actual rights of such possessor, and is good constructive notice of those rights."

It must be conceded that the language used by the learned Chan-

cellor in these cases, if strictly accurate, would go to sustain the doctrine contended for by the defendant's counsel. Notice is of two kinds: actual and constructive. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and like other legal presumptions, does not admit of dispute. "Constructive notice," says Judge Story, "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." Story's Eq. Juris. § 399.

A recorded deed is an instance of constructive notice. It is of no consequence whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. So, too, notice to an agent is constructive notice to the principal; and it would not in the least avail the latter to show that the agent had neglected to communicate the fact. In such cases, the law imputes notice to the party whether he has it or not. Legal or implied notice, therefore, is the same as constructive notice, and cannot be controverted by proof.

But it will be found, on looking into the cases, that there is much want of precision in the use of these terms. They have been not unfrequently applied to degrees of evidence barely sufficient to warrant a jury in inferring actual notice, and which the slightest opposing proof would repel, instead of being confined to those legal presumptions of notice which no proof can overthrow. The use of these terms by the Chancellor, therefore, in *Tuttle v. Jackson* and *Grimstone v. Carter*, is by no means conclusive.

The phraseology uniformly used, as descriptive of the kind of notice in question, "sufficient to put the party upon inquiry," would seem to imply that if the party is faithful in making inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty is he still to be bound, without any actual notice? The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry is, I apprehend, not a presumption of law, but of fact, and may, therefore, be controverted by evidence.

In *Whitbread v. Boulnois* (*supra*), Baron Alderson laid down the rule as follows: "When a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but on the contrary studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would

readily have ascertained." This very plainly implies that proof that the party has used due diligence, but without effect, would repel the presumption. In this case, it is true, the decision was against the party having the notice. But in *Jones v. Smith*, 1 Hare, 43, we have a case in which a party, who had knowledge sufficient to put him on inquiry, was nevertheless held not bound by the notice.

The defendant had loaned money upon the security of the estate of David Jones, the father of the plaintiff. At the time of the loan he was informed, by David Jones and his wife, that a settlement was made previous to the marriage, but was at the same time assured that it only affected the property of the wife. He insisted upon seeing the settlement, but was told that it was in the hands of a relative, and that it could not be seen without giving offence to an aged aunt of the wife, from whom they had expectations. David Jones, however, after some further conversation, promised that he would try to procure it for exhibition to the defendant. This promise he failed to perform. It turned out that the settlement included the lands upon which the money was loaned. Here was certainly knowledge enough to put the party upon inquiry; for he was apprised of the existence of the very document which was the foundation of the complainant's claim. He did inquire, however, and made every reasonable effort to see the settlement itself, but was baffled by the plausible pretences of David Jones. The Vice-Chancellor held the notice insufficient. He said: "The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present."

Possession by a third person, under some previous title, has frequently but inaccurately been said to amount to constructive notice to a purchaser, of the nature and extent of such prior right. Such a possession puts the purchaser upon inquiry, and makes it his duty to pursue his inquiries with diligence, but is not absolutely conclusive upon him. In *Hambury v. Litchfield*, 2 Myl. & Keene 629, when the question arose, the Master of the Rolls said: "It is true that when a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; but if, at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenants contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenants."

This doctrine is confirmed by the language of Judge Story, in *Flagg v. Mann et al.*, 2 Sumner, 554. He says: "I admit that the rule in equity seems to be, that where a tenant or other person is

in possession of the estate at the time of the purchase, the purchaser is put upon inquiry as to the title; and *if he does not inquire*, he is bound in the same manner as if he had inquired, and had positive notice of the title of the party in possession."

It is still further confirmed by the case of *Rogers v. Jones*, 8 N. Hamp. 264. The language of Parker, J., in that case, is very emphatic. He says: "To say that he (the purchaser) was put upon inquiry, and that having made all due investigation, without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd."

If these authorities are to be relied upon, and I see no reason to doubt their correctness, the true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part.

The judgment should be reversed, and there should be a new trial, with costs, to abide the event.

PAGE, J. The question to be decided is, whether under the finding of the referee, the plaintiff is to be deemed to have had at the time of his purchase, legal notice of the prior unrecorded mortgage of the defendant. The referee finds that the plaintiff had sufficient information or belief of the existence of such mortgage to put him upon inquiry; but that upon pursuing such inquiry to the extent of such information and belief, he did not find that such mortgage existed or had been given. It seems to me that the two findings are inconsistent with each other. If the plaintiff on pursuing an inquiry to the full extent of his information and belief as to the existence of the defendant's mortgage, was unable to find that it either then existed or had been given, the highest evidence is furnished that the information received or belief entertained by the plaintiff was not sufficient to put him on inquiry as to the existence of such mortgage. The last part of this finding effectually disproves the fact previously found of the sufficiency of notice to put the plaintiff on inquiry. The two facts are utterly inconsistent with each other, and cannot possibly coexist.

The remarks of Parker, Justice, in *Rogers v. Jones*, 8 N. Hamp. 264, 269, are directly apposite to the facts found by the referee. Judge Parker says: "To say that he (demandant), was put upon inquiry, and that having made all due investigation without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd." The sound sense of

these observations is clearly shown by the principle of the rule that information sufficient to put a party upon inquiry is equivalent to evidence of actual notice, or to direct and positive notice. That principle is, that such information will, if followed by an inquiry prosecuted with due diligence, lead to a knowledge of the fact with notice of which the party is sought to be charged. Hence, in all cases where the question of implied notice of a prior unrecorded mortgage or conveyance arises as a question of fact to be determined, the court must decide whether the information possessed by the party would, if it had been followed up by proper examination, have led to a discovery of such mortgage or conveyance. If the determination is that such an examination would have resulted in a discovery of the mortgage or conveyance, the conclusion of law necessarily results that the information possessed by the party amounted to implied notice of such instrument. But if the determination is the converse of the one stated, the information of the party cannot be held to be an implied notice of the deed or mortgage. These propositions will be found to be fully sustained by authority. *Kennedy v. Green*, 3 Myl. & Keene, 699; 2 Sugden on Vendors, &c., 552, Am. ed. of 1851, marg. page 1052; 4 Kent's Com. 172; *Howard Ins. Co. v. Halsey*, 4 Sandf. S. C. R. 577, 578; same case, 4 Seld. 274, 275; 1 Story's Eq. Jur. §§ 398-400, 400 a; *Jackson v. Burgott*, 10 John. 461; *Dunham v. Dey*, 15 John. 568, 569, in error; *Jackson v. Given*, 8 John. 137; *Jolland v. Stainbridge*, 3 Ves. 478; *Pendleton v. Fay*, 2 Paige, 205. Where the information is sufficient to lead a party to a knowledge of a prior unrecorded conveyance, a neglect to make the necessary inquiry to acquire such knowledge, will not excuse him, but he will be chargeable with a knowledge of its existence; the rule being that a party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry, suggested by such information, prosecuted with due diligence, would have disclosed to him. 4 Sandf. S. C. R. 578; 3 Myl. & Keene, 699. In this case the fact being found by the referee, that the plaintiff after pursuing an inquiry to the extent of his information, failed to discover the existence of the defendant's mortgage, it seems to me that neither law nor justice will justify us in holding the plaintiff chargeable with implied notice of such mortgage. The doctrine of notice and its operation in favor of a prior unrecorded deed or mortgage rests upon a question of fraud, and on the evidence necessary to infer it. 4 Kent's Com. 172. Actual notice affects the conscience, and convicts the junior purchaser of a fraudulent intent to defeat the prior conveyance. His knowledge of facts and circumstances at the time of the second purchase sufficient to enable him on due inquiry to discover the existence of the prior conveyance, is evidence from which a fraudulent intent may be inferred. 15 John. 569; 2 John. Ch. R. 190; *Jackson v. Burgott*, 10 John. 462. Now if it is ascertained and found as a fact, that the facts and circumstances within the knowledge of the

second purchaser, at the time of his purchase, were insufficient to lead him, on a diligent examination, to a discovery of the prior conveyance, how upon this finding can a fraudulent intent be inferred, and if not, how can he be charged with notice, which implies a fraudulent intent? It is not in the nature of things, that a knowledge of the same facts and circumstances, shall at one and the same time, be held evidence of both innocence and guilt. I think the rule well established that an inference of a fraudulent intent on the part of a junior purchaser or mortgagee, must in the absence of actual notice, be founded on clear and strong circumstances, and that such inference must be necessary and unquestionable. *McMechan v. Griffing*, 3 Pick. 149, 154, 155; *Hine v. Dodd*, 2 Atk. 275; *Jackson v. Given*, 8 John. 137; 2 Mass. 509; 2 John. Ch. R. 189; 15 John. S. C. 569; 8 Cow. 264, 266.

For the above reasons, both the judgment rendered on the report of the referee, and the judgment of the General Term affirming the same, should be reversed, and a new trial should be granted.

All the judges concurred in the result of the foregoing opinions except Comstock and Brown, who, not having heard the argument, took no part in the decision.

New trial ordered.

GEORGE v. KENT AND OTHERS

7 All. (Mass.) 16. 1863.

BILL in equity to redeem land from a mortgage.

It appeared at the hearing that on the 7th of May, 1850, Nathaniel Chessman, being the owner of a parcel of land on the south side of Water Street in Milford, containing about three acres, mortgaged it to Maxcy Cook; that afterwards, on the 1st of July, 1853, he conveyed a small lot on the easterly part thereof to Hugh Galliher, by a deed of warranty which was duly recorded; that afterwards, on the 5th of June, 1854, he conveyed a small lot on the westerly part thereof to Patrick Murphy, by a deed of warranty which was not recorded; and that afterwards, on the 2d of November, 1854, he conveyed another small lot, lying between the lots conveyed to Galliher and Murphy, to the plaintiff, by a deed of mortgage which was duly recorded, containing the following description of the mortgaged premises: "Beginning at the northeasterly corner of the premises, on Water Street, on the land of Hugh Galliher; thence S. 2° W. by land of said Galliher eight rods; thence S. 87¼° W. five and one half rods to land of Patrick Murphy, bounding southerly on land of N. Chessman; thence N. 2° E. eight rods to said street, bounding westerly on land of said Murphy; thence easterly by said street five and one half rods to the place of beginning." The mortgage to Maxcy Cook was assigned to the defendants in February, 1861; and in May, 1861, they commenced an action against the plaintiff to foreclose it, describing in their writ the lot conveyed to

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June 28*

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the plaintiff, and no more, and obtained a conditional judgment in February, 1862, for the sum of \$1,679.15. In April, 1861, the lot conveyed to Murphy became vested in the defendant Kent by mesne conveyances.

The plaintiff contended that the Murphy lot should be held to contribute, in proportion to its value, towards the redemption of the Cook mortgage; and the case was reserved by *Chapman, J.*, for the determination of the whole court.

CHAPMAN, J. It is not denied that the plaintiff has a right to redeem on payment of the amount for which conditional judgment was rendered; but he claims the right on payment of a less sum. He insists that as his deed was a deed of warranty, and was made and recorded, while the deed to Murphy was unrecorded, he has a right to hold the Murphy lot liable to contribute to the payment of the Cook mortgage. This position would be correct if there were no other facts to affect it. But the defendants reply that he had notice of the deed to Murphy. The fact relied on to prove such notice is, that Murphy's lot adjoins him on the west, and in his deed he is bounded westerly on land of Patrick Murphy. The court are of opinion that this was sufficient notice of Murphy's title. Before the enactment of Rev. Sts. c. 59, § 28, actual notice of an unrecorded deed was not necessary; and circumstantial evidence of title was held to be sufficient. But the Rev. Sts. made a change in this respect, and required that there should be actual notice. *Curtis v. Mundy*, 3 Met. 405. *Pomroy v. Stevens*, 11 Met. 244. *Mara v. Pierce*, 9 Gray 306. *Parker v. Osgood*, 3 Allen 487. The case of *Curtis v. Mundy* is, to some extent, overruled by the later cases; yet none of them hold it to be necessary that the notice shall be by actual exhibition of the deed. Intelligible information of a fact, either verbally or in writing and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary. In this case no particular form is necessary. The description of the land in the plaintiff's deed was equivalent to an affirmation of his grantor that the land lying west of it was owned by Patrick Murphy, by virtue of some proper instrument of conveyance. He knew from this information that Murphy's title was prior to his own. Having such a title, and the plaintiff having notice of it, Murphy and his grantees are not liable to contribute towards the redemption of the Cook mortgage. *Chase v. Woodbury*, 6 Cush. 143. *Bradley v. George*, 2 Allen 392.

The plaintiff is entitled to redeem on payment of the amount of the conditional judgment against him, with interest, deducting rents and profits received.¹

¹ Compare *Stanley v. Schwalby*, 162 U. S. 255; *Lagger v. Mutual Union Loan Ass'n.*, 146 Ill. 283; *Charles v. Whitt*, 187 Ky. 77.

As to what may amount to "actual" notice, see *Lamb v. Pierce*, 113 Mass. 72; *Maupin v. Emmons*, 47 Mo. 304; *Brinkman v. Jones*, 44 Wis. 498, 517 *et seq.*

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NEWMAN v. CHAPMAN

2 Rand. (Va.) 93. 1823.

APPEAL from the Chancery Court of Fredericksburg.

George Chapman, jun., filed his bill stating that a certain John Armistead of the County of Caroline, died in 1788, leaving a large estate in lands, negroes, and other property, which he devised to his children: that, his son William Armistead received the portion allotted to him, and gave a mortgage upon his land; which mortgage was afterwards assigned to a certain Jesse Simms: that the said Simms brought a suit in the Chancery Court of Richmond, to foreclose the said mortgage, and obtained a decree, by virtue of which the land was duly sold; the said Simms became the purchaser, and the court confirmed the sale; whereby, he became the lawful proprietor in fee, of the said land and appurtenances, so far as the title of the said William Armistead was concerned; and the said Simms was entitled to be put in possession of the same, subject only to the claims of such persons as should have right derived from any other person than the said William, or derived from him prior to the said mortgage or suit in chancery to foreclose, as aforesaid: that the sale and conveyance of the commissioners was made on the 13th of July, 1804, and on the 13th of August in the same year the said Jesse Simms conveyed the said tract of land with its appurtenances to the complainant, in consideration of \$11,400, which the complainant had previously paid to the said Jesse Simms, he not supposing that any dispute could be raised concerning a title, acquired and confirmed by the authority of the Court of Chancery; to which he is now obliged to apply for its further aid *to effectuate its own decree*: that a part of the said land, viz.: about 593 acres, is in possession of Thomas Newman; another part consisting of about acres is in possession of Richard Newman; and the residue is still in possession of the said William Armistead: that, Thomas and Richard Newman have no other title or claim to the said land, *except that derived from the said William Armistead, subsequent to the institution of the said suit of Jesse Simms, and while it was pending in the said Superior Court of Chancery*: that the said William Armistead has been in the receipt of the profits of the lands in his possession, by which he has principally maintained his family, and has rendered no account thereof to the complainant: that the rents and profits of the portions of land in possession of the said Thomas and Richard Newman, have been received by them, in like manner, and no account rendered to the complainant: that all these persons refuse to deliver possession to the complainant of the said lands, and also refuse to account for the profits, according to their respective receipts and enjoyments: that no writ of *habere facias possessionem* was issued from the said Superior Court, and the said Jesse Simms

is dead, insolvent, and has no representative known to the complainant: that, in a case so complicated, the complainant is advised to apply to the Court of Chancery, *to carry into effect its own decree*, in such manner as shall be consistent with the just rights of all persons who do not claim title from or under the said William Armistead, since the pendency of the said suit of the said Jesse Simms, whose bill was filed on the 12th day of May, 1797; but, with regard to the said William, the complainant is advised that the said decree and proceedings of sale are final and conclusive. He therefore prays, that the said Thomas and Richard Newman, and William Armistead, may be made defendants to this bill; that the decree aforesaid may be carried into effect, in favor of the complainant, against the said William Armistead, and all persons claiming under him, since the 12th day of May, in the year 1797, &c.

Thomas Newman answered, that he had purchased of William Armistead, at different times, between the years 1793 and 1797, about 326 acres of land, out of the tract in the bill mentioned; that the deeds will fully show, at what time the purchases of the said land were made, except as to 47 acres, which were purchased in October, 1793; but, that the defendant did not get a conveyance from the said William Armistead, *until the month of July, 1797, at or about which time he purchased a further quantity of 104 acres*, and both purchases were included in the same deed; that the defendant *never knew anything of the existence of the suit in Chancery for the sale of the lands in the bill mentioned, until long after he had completed his purchases of the aforesaid lands of William Armistead*; nor had he ever seen anything of the mortgage in the bill mentioned; nor did he know that any such mortgage existed, until he had completed those purchases and obtained his deeds; that the defendant also purchased of John B. Armistead, who had, before that time, purchased of William Armistead, about 513 acres of the same tract of land, on or about the month of April or May, 1800, but did not get a conveyance for the same, until the month of April, 1801; that at the sale by the commissioners, the defendant attended with his deeds, and forbade the sale, as it would be illegal, and the title was in him. He therefore charges, that the complainant, before he purchased of Simms, was fully apprised of the title of the defendant.

Richard Newman stated in his answer, that, as to the transactions between William Armistead and Abraham Morehouse, and the mortgage of land to him by the said Armistead, *he had heard nothing, until several years after he had purchased of William Armistead 163 acres of land, at 40 shillings per acre, and had the deed for the same recorded in the County Court of Prince William*, which record was made in October, 1793; and, when he did hear that such a mortgage was in existence, he also heard that *it had not been recorded in due time to give it validity against the claim of a third person*. He, therefore, hopes, that his title to the lands purchased

of William Armistead, may not be affected by any decision relative to the said mortgage, &c.

The deed of mortgage from William Armistead and wife to Abraham Morehouse, was dated on the 3d day of December, in the year 1794; which mortgage was assigned by David Allison, as attorney for the said Morehouse, to the said Simms, by virtue of a power of attorney, which was attested by only *two witnesses*.

A deed from William Armistead and Nancy, his wife, and John B. Armistead to Thomas Newman, conveying 151 acres, is dated on the 11th day of September, 1797.

A deed from William Armistead to Thomas Newman, dated the 26th day of September, 1793, for 175 acres.

The bill to foreclose, brought by Jesse Simms against William Armistead, was filed on the 12th day of May, 1797.

The deed made by the commissioners for the sale of the land, under a decree of the court, to Jesse Simms, is dated on the 13th day of July, 1804.

The deed from Jesse Simms to George Chapman, the plaintiff, conveying the tract of land on which William Armistead then lived, containing 1140 acres, more or less, being the same that the said Armistead conveyed to Abraham Morehouse, by deed of mortgage, dated the 3d of December, 1794, and by the said Morehouse assigned to the said Jesse Simms.

The mortgage from Armistead to Morehouse was not recorded within the time prescribed by law.

The deed from William Armistead to Richard Newman, conveying 163 acres, is dated the 27th day of September, 1793.

William Armistead never answered the bill.

The *Chancellor* decreed, that William Armistead and Thomas Newman should severally deliver up to the plaintiff, possession of all the lands held by them, mentioned in the deed of mortgage between Armistead and Morehouse, except 175 acres described in the deed of the 26th of September, 1793, between the said Armistead and Thomas Newman; and, that one of the commissioners of the court should make up an account of the rents and profits of the lands so directed to be given up, from the 9th day of August, 1804.

Thomas Newman appealed to this court.

December 6. JUDGE GREEN delivered the following opinion:—

The object of the Statute requiring mortgages to be recorded, and declaring that, if not recorded as the Statute prescribes, they shall be void as to creditors and subsequent purchasers, was to prevent, by affording the means of ascertaining the existence of the encumbrance, the frauds which might otherwise be practised by the mortgagor and mortgagee, on creditors and subsequent purchasers, by concealing it. If a purchaser has actual notice otherwise of the existence of the mortgage, he is not only not prejudiced by the failure to record it, but is himself guilty of a fraud in attempting

to avail himself of the letter of the Statute, to the prejudice of another who has a just claim against the property. The Statute, indeed, vests in the subsequent purchaser, in that case, the legal title; yet, although the legal title of the mortgagee is divested by the subsequent conveyance, his *equitable right* to subject the property to the payment of the debt, remains; not only because the mortgage is good between the parties; but, even if void as a conveyance between the parties, it would still be evidence of an agreement between them, and a court of equity will give effect to the equity of the mortgagee, by holding the subsequent purchaser to be a trustee. Upon these principles, the Court of Chancery in England has always relieved a prior purchaser, whose deed has not been registered, against a subsequent purchaser with notice.

I had at one time great doubts, whether the principle of those decisions did not apply to the case of a *lis pendens*. Lord Hardwicke, in the leading case of *Le Neve v. Le Neve*, 3 Atk. 646, declared, that the Statutes of Registry in England (which, as to the matter under consideration, are the same in effect as our Statute), only vested the legal title in the subsequent purchaser, and left the case "open to all equity;" and, in that case, he relieved, against a subsequent purchaser, upon *constructive*, and not *actual* notice, the notice being to an agent of the purchaser. A *lis pendens* has always been spoken of in the English Court of Chancery, as a constructive notice to all the world; as all men are bound and presumed to take notice of the proceedings of a court of justice. If these propositions were universally true, it would seem to follow, that a *lite pendente* purchaser was a purchaser with notice, and would take the property subject to the claims of the plaintiff in the suit, as the defendant held it. In all questions of fact, the existence of the matter in question may be proved by direct evidence, or by the proof of other facts, from which it may be justly be inferred, that the fact in question does exist. A fact thus proved by circumstantial evidence, is taken to exist for all purposes, as if it were proved by direct evidence. I cannot, therefore, feel the force of the observation frequently thrown out in modern cases, that a notice to affect a subsequent purchaser, after an unregistered deed, must be *actual*, and such as to affect his conscience, and not *constructive*. A notice, proved by circumstances to exist, affects the conscience of the party as much as if proved by direct evidence. In all other cases, a purchaser of a legal estate, with notice of a subsisting equity, is bound by *constructive*, as well as by *actual*, notice; and *that*, because his conscience is affected, and he is guilty of a fraud. Without fraud on his part, his legal title ought to prevail. I see no reason why a difference should be made, between the case of a purchaser after an unregistered deed, and a purchaser of a legal title, subject to any other equity, as to the proof of the notice which ought to be held to bind them. This distinction between an *actual* and *constructive* notice, in the

case of a purchaser after an unregistered deed, seems to have proceeded from a doubt, whether the relief given in the early cases upon that subject, had not been in opposition to the spirit and policy, as well as the letter, of the Statutes of Registry.

The rule, as to the effect of a *lis pendens*, is founded upon the necessity of such a rule, to give effect to the proceedings of courts of justice. Without it, the administration of justice might, in all cases, be frustrated by successive alienations of the property, which was the object of litigation, pending the suit, so that every judgment and decree would be rendered abortive, where the recovery of specific property was the object. This necessity is so obvious, that there was no occasion to resort to the presumption, that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit, to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of the day. For, at common law, the writ was pending from the first moment of the day on which it was issued and bore *teste*; and a purchaser, on or after that day, held the property subject to the execution upon the judgment in that suit as the defendant would have held it, if no alienation had been made. The Court of Chancery adopted the rule, in analogy to the common law; but relaxed, in some degree, the severity of the common law. For, no *lis pendens* existed until the service of the *subpœna* and bill filed; but, it existed from the service of the *subpœna*, although the bill were not filed until long after; so that a purchaser, after service of the *subpœna* and before the bill was filed, would, after the filing of the bill, be deemed to be a *lite pendente* purchaser, and as such, be bound by the proceedings in the suit, although the *subpœna* gave him no information as to the subject of the suit. A *subpœna* might be served the very day on which it was sued out, and there is an instance in the English books of a purchaser who purchased on the day that the *subpœna* was served, without actual notice, and who lost his purchase by force of this rule of law. This principle, however necessary, was harsh in its effects upon *bona fide* purchasers, and was confined in its operation to the extent of the policy on which it was founded; that is, to the giving full effect to the judgment or decree which might be rendered in the suit depending at the time of the purchase. As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a nonsuit, or if a suit in chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if at law or in chancery a suit abated; although, in all these cases, the plaintiff, or his proper representative might bring a new suit for the same cause, he must make the one who purchased pending the former suit, a party; and, in this new

suit, such purchaser would not be at all affected by the pendency of the former suit at the time of his purchase. In the case of an abatement, however, the original suit might be continued in Chancery, by revivor, or at law, in real actions, abated by the death of a party, by *journies accounts*, and the purchaser still be bound by the final judgment or decree. If a suit be brought against the heir, upon the obligation of his ancestor binding his heirs, and he alienates the land descended, pending the writ, upon a judgment in that suit, the lands in the hands of the purchaser would be liable to be extended, in satisfaction of the debt. But, if that suit were discontinued, abated, or the plaintiff suffered a nonsuit, in a new action for the same cause, the purchaser would not be affected by the pendency of the former suit at the time of his purchase; and, if he could be reached at law, in equity it could only be, upon proof of actual notice and fraud. If a *lis pendens* was notice *then*, as a notice at or before the purchase would, in other cases, bind the purchaser in any suit in equity, prosecuted at any time thereafter, to assert the right of which he had notice, would bind the purchaser, so ought the *lis pendens* to bind him in any subsequent suit prosecuted for the same cause; but it does not. Again; a bill of discovery, or to perpetuate the testimony of witnesses, ought, if all persons were bound to take notice of what is going on in a court of justice, to be a notice to all the world, as much as a bill for relief. But, these are decided to be no notice to any purpose; a proof that the rule, as to the effect of a *lis pendens*, is one of mere policy, confined in its operation strictly to the purposes for which it was adopted; that is, to give effect to the judgments and decrees of courts of justice, and that it is not *properly* a notice to any purpose whatsoever. The English judges and elementary writers have carelessly called it a notice, because, in one single case, that of a suit prosecuted to decree or judgment, it had the same effect upon the interests of the purchaser, as a notice had, though for a different reason. But, the courts have not, in any case, given it the real force and effect of a notice.

I think that the Statute overrules this principle of law, in the case of a *lite pendente* purchaser, after an unrecorded mortgage. The decisions in the cases of notice, are according to the policy and spirit of the Statutes; since, in those cases, the purchaser has the very benefit which the law intended to provide for him, and he is chargeable with *mala fides*, in attempting to acquire that to which he knows another has a just right. He cannot complain, that the mortgagee has done him an injury by his default in failing to record his mortgage, as the law requires. But, if the purchaser were held to be affected by the pendency of a suit, if he had not actual notice, he would suffer an injury by the default of the mortgagee, unless it were held to be his duty to inquire if any suit were depending, when he had no reason to suspect that there was any defect in the

title. I think, that to require him to look to any other source of information than that which the Statute has provided for him, would be contrary to the spirit and policy, and letter of the Statute.

It follows, that the decree is erroneous, as it respects the 151 acres conveyed to the appellant in September, 1797; but, as to the 513 acres, which the appellant states in his answer that he purchased in 1800, he is not protected by the Statute. He admits, that he came into the possession *pendente lite*. He does not deny notice of the mortgage, if that fact be material, upon the pleadings in this cause; and he does not show that he was a purchaser, and that a conveyance was made to him. As to this, then, the decree ought to be affirmed, unless the other objections made at the bar ought to prevail. These are, that the suit was not so instituted as to attach on Morehouse's title under the mortgage, he not being a party, and there being no evidence that his title was in the plaintiff in that suit; that a court of equity has no jurisdiction, as the plaintiff, if he has a right, has a legal remedy; that the deed under which the plaintiff claims, passed no title, as the property was then in the adverse possession of another; and, that the rents and profits should be ascertained by a jury, and not by a commissioner.

If the rule be, that a purchaser, pending the suit, is bound by the decree in the suit as the defendant is bound, then it is too late now to urge the first of these objections. It might, possibly, have been urged by Armistead, whilst the suit was depending. But, failing to do so, he was bound by the decree, whether it were right or wrong. I think, however, that the objection could not have been relied on with effect, in the original suit. The power of attorney, by authorizing the attorney to dispose of the mortgage, for and in the name of Morehouse, authorized him to convey the legal title, and that was the effect of the deed to Simms. The power of attorney being attested by only two witnesses, was not, for that cause, defective. The law does not require any particular form, as to the attestation of a power of attorney to convey land: as, between the parties, such a power may be proved by any evidence, which would be sufficient to prove any other fact in a court of justice. A court of equity always has jurisdiction to carry into effect its own decrees. In this case, a bill for that purpose was necessary; as well, because another party, not appearing as a party on the record, had become interested, as on account of the death of Simms. The decree had never been executed. If there had been no change of the interest, and Simms had lived, the decree might have been executed, and Simms let into possession by the ordinary proceedings in the court for that purpose. After the decree was so executed, if Simms, or his assignee, had been ousted or disturbed, he or his assignee would have been bound to proceed at law. The Court of Chancery was not *functus officio*, until the decree was executed by the delivery of possession.

I do not think, that Armistead could hold a possession adverse to

Morehouse or his assignee, and consequently the conveyances of Morehouse and Simms passed the title they professed to pass, unless the sale to Newman varied the case; but, that sale being made pending the suit, Newman could no more hold an adversary possession, unless he had taken a conveyance without notice, than Armistead himself could. Armistead was a tenant at will, and so was Newman, standing in his place.

The account of rents and profits might as well be taken by a commissioner, as ascertained by a jury; and the former is the most usual course.¹

JUDGE COALTER. I am of opinion, that the Chancellor erred in his decree, in directing the appellant to deliver possession of the tract of 151 acres, conveyed by William Armistead to him, on the 11th of September, 1797, by the deed of lease and release in the record, of that date.

The bill claims to set up a mortgage, executed by the aforesaid William Armistead, of anterior date to the above conveyance; but which was never recorded, purely on the ground, that at the time of the purchase by the appellant, there was a suit pending to foreclose the mortgage.

If the Act of Assembly in regard to mortgages not recorded, and which was in force at the time this bill was filed, is to be construed in connection with the previous clause in relation to other conveyances, so as to transpose the words from the one to the other, in relation to notice, and thus to make the law precisely what it now is, under the Act of 1819; let us inquire how the appellee would have stood in a court of law, on a special verdict, finding simply the mortgage and subsequent conveyance, and a suit pending to foreclose the mortgage at the time of the conveyance?

The case for him would rest on an unrecorded mortgage against a subsequent conveyance, and which is expressly declared by the Act to be void as to such subsequent purchaser, *not having notice thereof*. What sort of notice? Undoubtedly, such as would affect the conscience of the purchaser; otherwise, the Act would be no safeguard to the innocent, as it was intended to be. A mere *lis pendens* is not such notice as that. This has been decided, as will be seen in a case mentioned in a note to the case of *Le Neve v. Le Neve*; and, also,

¹ The following were the cases referred to by JUDGE GREEN, in the course of his opinion: *Durbaine v. Knight*, 1 Vern. 318; *Preston v. Tubbin*, Ibid. 286; 15 Vin. Abr. 128, pl. 2; *Birch v. Wade*, Ves. & Beam. 200; *Murray v. Ballow*, 1 Johns. Ch. Cas.; *Littleberry's Case*, 5 Rep. 476; Cro. James, 340; 2 Eq. Ca. Abr. 482; Ib. 685; 3 Ves. 485; 1 Eq. Ca. Abr. 358; *Bennet v. Batchelor*, 1 Ves. jun. 64; *Habergham v. Vincent*, Ibid. 68; 3 Atk. 243; *Shannon v. Bradstreet*, 1 Sch. and Lefr. 66; *Brace v. Duchess of Marlborough*, 2 P. W. 491; 2 Vent. 337; *Brotherton v. Hatt*, 3 Vern. 574; 2 Eq. Ca. Abr. 594; Bac. Abr. tit. Fraud, letter C; *Gooch's Case*, 5 Co. Rep. 80; 1 Fonb. Eq. 279; *Curtis v. Perry*, 6 Ves. 745; *Davis v. Earl of Strathmore*, 16 Ves. 419; *Wyatt v. Barwell*, 19 Ves. 439.

as I am told, in a late case which I have not examined, reported in 19 Vesey. A court of law could not substitute any other kind of notice for that contemplated by the Act. But, if the party has ground for coming into equity, that court, too, I presume, must follow the law.

But if, previous to the Act of 1819, the mortgagee of an unrecorded mortgage stood, as against a subsequent purchaser, as he did in England under the Registry Acts (and I incline to think he did), then his only remedy was in equity; and there he can only prevail on the ground of fraud, or such notice as would affect the conscience of the purchaser, and which was, therefore, considered a fraud; and it has been decided as aforesaid, and, I think, correctly, that a mere *lis pendens* did not affect the conscience.

Suppose, in this case, the appellant had not denied notice, no charge of notice being in the bill, but had simply answered, that he had purchased for value, and got his deed, exhibiting it with his answer, and had demurred to the residue of the bill. Could the appellee have succeeded? I apprehend not. Or, would not such an answer have been a full response to the bill, no fraud or notice being charged, and sufficient of itself to defeat the claim of the appellee? I am much inclined to think it would; and, therefore, had the appellant exhibited a deed from William Armistead to John B. Armistead, and from the latter to him for the 513 acres mentioned in the argument, although there is no denial of notice as to it, I should, as at present advised, have thought that the appellee could not have recovered that tract, without amending his bill, and putting the fact of notice or fraud in issue; so as to give the appellant an opportunity of answering thereto. It is, however, not necessary to decide this point, because the appellant does not show himself to be a subsequent purchaser of that tract, and it is only against such that the mortgage is void.

Whether, as this is an interlocutory decree, he may hereafter be permitted to file those documents, if they exist, is not for me to know or anticipate. On the record, now before the court, the decree must be reversed as to the 151 acres, and affirmed as to the residue.

JUDGE BROOKE concurred: and a decree was entered conformable to the foregoing principles.¹

¹ "It is only by actual notice clearly proved that a registered conveyance can be postponed. Even a *lis pendens* is not deemed notice for that purpose." Per Sir William Grant, M. R., in *Wyatt v. Barwell*, 19 Ves. 435, 439.

Accord, *Douglass v. McCrackin*, 52 Ga. 596; *M'Cutchen v. Miller*, 31 Miss. 65, 85.

Compare *Edwards v. Banksmith*, 35 Ga. 213; *Grant v. Bennett*, 96 Ill. 513; *Smith v. Hodsdon*, 78 Me. 180; *Jackson d. Hendricks v. Andrews*, 7 Wend. (N. Y.) 152.

On the application of the doctrine of *lis pendens* to chattels personal. see *Bolling v. Carter*, 9 Ala. 921; *McDermot v. Hayes*, 175 Cal. 95; *State v.*

SECTION IV

REGISTRATION NOT IN CHAIN OF TITLE

BOARD OF EDUCATION OF MINNEAPOLIS v.

HUGHES AND OTHERS

118 Minn. 404. 1912.

ACTION in the district court for Hennepin county to determine adverse claims to a certain city lot. The answer alleged that Lucius A. Hughes was the sole owner and plaintiff had no right in or title to the lot. The reply alleged that the deed of Hughes was delivered with the name of the grantee left blank, was invalid and conveyed no title, and plaintiff had no notice of the deed until December, 1910. The case was tried before Hale, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff. From an order denying their motion for a new trial, defendants appealed. Reversed and new trial granted.

BUNN, J. Action to determine adverse claims to a lot in Minneapolis. The complaint alleged that plaintiff owned the lot, and the answer denied this, and alleged title in defendant L. A. Hughes. The trial resulted in a decision in favor of plaintiff, and defendants appealed from an order denying a new trial.

The facts are not in controversy and are as follows: On May 16, 1906, Carrie B. Hoerger, a resident of Faribault, owned the lot in question, which was vacant and subject to unpaid delinquent taxes. Defendant L. A. Hughes offered to pay \$25 for this lot. His offer was accepted, and he sent his check for the purchase price of this and two other lots bought at the same time to Ed. Hoerger, husband of the owner, together with a deed to be executed and returned. The name of the grantee in the deed was not inserted; the space for the same being left blank. It was executed and acknowledged by Carrie B. Hoerger and her husband on May 17, 1906, and delivered to defendant Hughes by mail. The check was retained and cashed. Hughes filled in the name of the grantee, but not until shortly prior to the date when the deed was recorded, which was December 16, 1910. On April 27, 1909, Duryea & Wilson, real estate dealers, paid Mrs. Hoerger \$25 for a quitclaim deed to the lot, which was executed and delivered to them, but which was not recorded until December 21, 1910. On November 19, 1909, Duryea & Wilson executed

Wichita County, 59 Kan. 512; *Mabee v. Mabee*, 85 N. J. Eq. 353, 358; *Smith v. Curreathers Co.*, 184 Pac. (Okla.) 102; *Pope v. Beauchamp*, 110 Tex. 271; *Wigram v. Buckley*, [1894] 3 Ch. 483.

The whole doctrine of *lis pendens* is frequently regulated by statute. Mass. Gen. Laws (1921), C. 184, §§ 15-17; St. 2 & 3 Vict., C 11, § 7; 2 Pomeroy, Equity Jur., 4th ed., §§ 640-643.

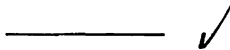
and delivered to plaintiff a warranty deed to the lot, which deed was filed for record January 27, 1910. It thus appears that the deed to Hughes was recorded before the deed to Duryea & Wilson, though the deed from them to plaintiff was recorded before the deed to defendant.

The questions for our consideration may be thus stated: (1) Did the deed from Hoerger to Hughes ever become operative? (2) If so, is he a subsequent purchaser whose deed was first duly recorded, within the language of the recording act?

1. . . . Our conclusion¹ is, therefore, that the deed to Hughes became operative as a conveyance when he inserted his name as grantee.

2. When the Hughes deed was recorded, there was of record a deed to the lot from Duryea & Wilson to plaintiff, but no record showing that Duryea & Wilson had any title to convey. The deed to them from the common grantor had not been recorded. We hold that this record of a deed from an apparent stranger to the title was not notice to Hughes of the prior unrecorded conveyance by his grantor. He was a subsequent purchaser in good faith for a valuable consideration, whose conveyance was first duly recorded; that is, Hughes' conveyance dates from the time when he filled the blank space, which was after the deed from his grantor to Duryea & Wilson. He was, therefore, a "subsequent purchaser," and is protected by the recording of his deed before the prior deed was recorded. The statute cannot be construed so as to give priority to a deed recorded before, which shows no conveyance from a record owner. It was necessary, not only that the deed to plaintiff should be recorded before the deed to Hughes, but also that the deed to plaintiff's grantor should be first recorded. *Webb*, Record of Title, § 158; 3 Washburn, Real Property, 292; *Losey v. Simpson*, 11 N. J. Eq. 246; *Burke v. Beveridge*, 15 Minn. 160 (205); *Schoch v. Birdsall*, 48 Minn. 443, 51 N. W. 382.

Our conclusion is that the learned trial court should have held on the evidence that defendant L. A. Hughes was the owner of the lot. Order reversed, and new trial granted.²



VAN RENSSELAER AND OTHERS v. CLARK.

17 Wend. (N. Y.) 25. 1837.

THIS was an action of *ejectment*, tried at the Tompkins Circuit in June, 1835, before the *Hon. Robert Monell*, one of the Circuit judges.

The plaintiffs showed title in one Derick Schuyler, to lots No. 57 and 58 — Ulysses, in the military tract, containing 1,200 acres of

¹ The opinion on this point is omitted.

² See *Tenn. Co. v. Gardner*, 131 Ala. 599; *Ora v. Bane*, 92 Kan. 567.

land and a deed from Schuyler to James Van Rensselaer, the father of the plaintiffs, bearing date 25th August, 1794, conveying the two lots for the *consideration of fifty dollars*; which deed was *recorded* in the County of Cayuga, 2d January, 1804. The plaintiffs did not prove that the deed was *deposited* according to the requirement of the Act of 1794. *Previous* to the deed from Schuyler to Van Rensselaer being recorded, to wit, on the 2d July, 1799, Derick Schuyler for the consideration of \$1000, conveyed the same lots to one Philip H. Schuyler, who procured his deed to be recorded on the 25th October, 1802, and on 2d April, 1805, conveyed lot No. 57 to one Samuel Clark for the consideration of \$1300. Clark in 1806, conveyed to James Emott for the consideration of \$2500, and Emott in 1833, conveyed to Mathias Miller for the consideration of \$10,233.43. The premises in question, are part of lot No. 57, and at the commencement of the suit, were in possession of the defendant as the tenant of Miller. It was proved that Philip H. Schuyler at the time of the conveyance to him, had *actual notice* of the deed to Van Rensselaer; this evidence was objected to but received by the judge, who charged the jury that Philip H. Schuyler was not a *bona fide* purchaser and his deed was *void*, notwithstanding it was first recorded, if at the time he took his conveyance he had knowledge or had notice of the previous deed to Van Rensselaer; and that the record of the deed to Van Rensselaer was sufficient notice to *subsequent purchasers* and rendered void the conveyances to them. The defendant excepted to the charge, and the jury found for the plaintiffs. The defendant moves for a new trial.

By the Court, COWEN, J. The question of knowledge in Philip H. Schuyler was put to the jury, who found for the plaintiffs as they were directed to do by the judge, on being satisfied that he had *actual notice* of the prior deed. Their finding is fully sustained by the evidence.

The defendant moves for a new trial on the ground that James Van Rensselaer's deed, not being *deposited* as required by the Statute, was fraudulent and void as against P. H. Schuyler, though he had full notice. To this the answer is, the Act applies only to such deeds as were dated *prior* to its passage, which was on the 8th January, 1794. Van Rensselaer's deed was dated in August of that year. The Statute of 8th January, 1794, after reciting that many frauds had been committed in respect to these bounty lands, by forging and antedating conveyances of lands to different persons, and various other contrivances, so that it had become difficult to discover the legal title; for remedy whereof and in order to detect the said frauds and to prevent like frauds in future, enacted, by § 1, that all deeds, &c. theretofore made concerning such lands should, on or before the 1st of May, 1794, be deposited with the clerk of the city and county of Albany; and that those not so deposited should be adjudged fraudulent and void against the *subsequent purchaser, &c. for valuable con-*

sideration; and that every deed, &c. *thereafter* to be made, &c. should be adjudged fraudulent and void as against any *subsequent purchaser, &c. for valuable consideration*, unless recorded by the clerk of Herkimer County, before the recording of the deed, &c. of the subsequent purchaser. Other counties were afterwards substituted as places of registry.

It is objected that Schuyler's deed was first recorded. The answer given is, he had actual notice of Van Rensselaer's deed, which was held sufficient as to him in *Jackson, ex dem. Gilbert v. Burgott*, 10 Johns. R. 457. The point was there very fully examined by Chief Justice Kent, who delivered the opinion of the court, and the import of the words *purchaser for a valuable consideration* was considered synonymous with *bona fide purchaser*. And it was held that *actual notice* takes away *bona fides* as effectually, under this Act, as under the General Registry Act. The position was never doubted as to the latter, and was so expressly adjudged in *Jackson, ex dem. Merrick v. Post*, 15 Wendell 588. The case of *Jackson v. Burgott* turned on the very points arising out of the identical Statute on which the titles of these parties depend. The court held, 1. that actual notice was equivalent to registry, and 2. that this was so as well at law as in equity. That it is so in equity is admitted by the English courts in respect to the Middlesex Registry Act, 7 Anne, *ch.* 20, § 1, which was the model of this Military Registry Act; though the King's Bench in *Doe ex dem. Robinson v. Allsop*, 5 Barn. & Ald. 142, refused to import the equitable doctrine into a court of law. This is but little more, probably, than a dispute about form; at any rate, it is enough for us to see that the contrary has been long settled in this court.

But it is said that Clark bought of Schuyler on the faith of finding that *his deed* was first recorded, and that he shall not be holden to look farther, and run the hazard of actual notice to Schuyler. In *Jackson ex dem. Merrick v. Post*, it was held that the registry of a deed is notice to every one, from the time of its being recorded, even to a purchaser standing a second or farther remove from the common source of title. The same case held that, having such notice, the purchaser takes at the peril of his immediate grantor's title being impeached by actual notice, though his deed was recorded previous to the adverse one. This, it is true, was under the General Registry Acts; but if the case of *Jackson v. Burgott* is to govern, the same rules apply to deeds of military bounty lands. That case holds, that actual notice is a substitute for registry. Under both Acts, to entitle the purchaser to protection he must be a *bona fide* purchaser in the strict sense of the term. He must not have notice when he buys. If the registry be notice, it takes away *bona fides*. There is nothing to distinguish the two Acts in regard to the effect of registry. By both it is declared to be notice in much the same phrasology. Under the General Registry Act it is declared that every conveyance

Under this Statute, the court, at an early period, held that the recording was designed to take the place of the notorious act of livery of seisin; and that, though by the first deed the title passed out of the grantor, as against himself, yet he could, if such deed was not recorded, convey a good title to an innocent purchaser who received and recorded his deed. But the court also held that a prior unrecorded deed would be valid against a second purchaser who took his deed with a knowledge of the prior deed, thus engrafting an exception upon the Statute. Reading of Judge Trowbridge, 3 Mass. 575. *Marshall v. Fisk*, 6 Mass. 24.

This exception was adopted on the ground that it was a fraud in the second grantee to take a deed, if he had knowledge of the prior deed. As Chief Justice Shaw forcibly says, in *Lawrence v. Stratton*, 6 Cush. 163, the rule is "put upon the ground, that a party with such notice could not take a deed without fraud, the objection was not to the nature of the conveyance, but to the honesty of the taker; and, therefore, if the estate had passed through such taker to a *bona fide* purchaser, without fraud, the conveyance was held valid."

This exception by judicial exposition was afterwards engrafted upon the Statutes, and somewhat extended, by the Legislature. Rev. Sts. c. 59, § 28; Gen. Sts. c. 89, § 3; Pub. Sts. c. 120, § 4. It is to be observed that, in each of these revisions, it is provided that an unrecorded prior deed is not valid against any persons except the grantor, his heirs and devisees, "and persons having actual notice" of it. The reason why the Statute requires actual notice to a second purchaser, in order to defeat his title, is apparent: its purpose is that his title shall not prevail against the prior deed, if he has been guilty of a fraud upon the first grantee; and he could not be guilty of such fraud, unless he had actual notice of the first deed.

Now, in the case before us, it is found as a fact that the tenant had no actual knowledge of the prior mortgage to the demandant at the time he took his assignment from Clark; but it is contended that he had constructive notice, because the demandant's mortgage was recorded before such assignment.

It was held in *Connecticut v. Bradish*, *ubi supra*, that such record was evidence of actual notice, but was not of itself enough to show actual notice, and to charge the assignee of the second deed with a fraud upon the holder of the first unrecorded deed. This seems to us to accord with the spirit of our registry laws, and with the uniform understanding of and practice under them by the profession.

These laws not only provide that deeds must be recorded, but they also prescribe the method in which the records shall be kept and indexes prepared for public inspection and examination. Pub. Sts. c. 24, §§ 14-26. There are indexes of grantors and grantees, so that, in searching a title, the examiner is obliged to run down the list of grantors, or run backward through the list of grantees. If he can start with an owner who is known to have a good title, as, in the

case at bar, he could start with Hall, he is index of grantors until he finds a conveyance land in question. After such conveyance, a stranger to the title, and the examiner must of the new owner to see if he has conveyed would be a hardship to require an examiner of grantors the names of every person who perhaps a long chain of title, was the owner.

We do not think this is the practical course and conveyancers have given to our registries. The inconvenience of such a construction would be manifest. The inconvenience of requiring a person, who records his prior deed for a time, to record it, is an equity to set aside the subsequent deed, if it is his rights.

The better rule, and the one the least likely to be titles, seems to us to be, that, if a purchaser registers, find a conveyance from the owner of which gives him a perfect record title complete at the time it is recorded, regards as equivalent. He is entitled to rely upon such record title. He need not search the records afterwards, in order to see if there is a prior unrecorded deed of the original owner.

This rule of property, established by the case of *v. Bradish*, ought not to be departed from, and therefor can be shown.

We are therefore of opinion, that, in this case, the plaintiff has the better title; and, according to the verdict ordered for the demandant must

MCQUADE ET AL. v. W

183 N. W. (Mich.) 7

APPEAL from Circuit Court, Oakland
L. Covert, Judge.

Bill by George J. McQuade and others against and another. From decree for plaintiff.
Affirmed.

Argued before STEERE, C. J., and BIRD, SHARPE, and WIEST, JJ.

FELLOWS, J. In 1910 defendant was the owner of 105 acres of farm land lying on a 10-mile road. It was over in Oakland.

¹ See *Day v. C*



She and her husband, an attorney then practicing in Detroit, conceived the idea of platting a portion of it for a high-class residential subdivision. The plat was prepared and recorded. Its residential and restricted character was made the subject of advertisement and pointed out in conversation as an inducement to prospective purchasers. A general plan was adopted to make it a high-class restricted residential district. A considerable number of men, many of them with children growing up, desiring a home in such a district, purchased lots. Substantial homes were built, and an additional subdivision was platted adjoining it. To insure and preserve the residential character of the subdivisions, substantially uniform restrictions were inserted in the deeds executed by Mrs. Wilcox to the purchasers. We quote the restrictions found in the original conveyance of the lot now owned by plaintiffs McQuade:

"It is agreed that said lot shall be used for residence purposes only; that only one (single) residence shall be placed thereon, the value of which shall be not less than \$3,000.00, the front wall thereof to be at least 50 feet from the front line of the lot, and the side wall not less than 20 feet from the side line of the lot, and all other buildings in the rear of the lot and at least 150 feet from the street line. A sewer may be made and perpetually maintained along the rear line of the lots in this block whenever the owners of a majority of the frontage of lots so desire, for which each of the then owners of property adjoining said sewer line agrees to pay the pro rata part of its cost according to the frontage on said sewer line. These conditions are for the benefit of all present and future owners of property in this subdivision and are to remain in force until July 1, 1935, and shall then terminate."

All of the deeds executed by Mrs. Wilcox are not in the printed record. Many of them were introduced in evidence in the court below. It is insisted by defendants' counsel that most or all of them use the word "block" instead of "subdivision" in the last sentence just quoted. We do not find this to be the case in the original deed to the property of plaintiffs Stanton. The language there found is as follows:

"These conditions are for the benefit of all present and future owners of property in this subdivision and are agreed to by all such owners and are to remain in force until July 1, 1935, and shall then terminate."

The original deeds through which plaintiff Hewitt and plaintiff Bogart claim use the word "block," but both of these lots are in the same block, if it may be said there are blocks on the plat, as the Wilcox lot, so that this difference in the word used becomes unimportant. As we understand the record, the deeds all contained substantially the same restrictions.

Lot 2 on the plat is a very large lot said to contain four acres. On it is the Wilcox home, built before the platting. It is a large sub-

veyed, the record of such conveyance will, it seems, affect a subsequent purchaser of the former lot with notice of such easement, and he will take subject thereto. In such a case, at common law, the purchaser would take subject to the easement previously created, as being a legal interest, irrespective of whether he has notice thereof, and the rule in this respect could not well be regarded as changed by the adoption of the recording law, as applied to a case in which the grant of the easement does appear of record, though in connection with the conveyance of other land, to which the easement is made appurtenant. * * * And if, in conveying lot A, the grantor enters into a restrictive agreement as to the improvement of lot B, retained by him, a subsequent purchaser of lot B would ordinarily be charged with notice of the agreement, by reason of its record as a part of the conveyance of lot A. Were he not so charged, the restrictive agreement might be to a considerable extent nugatory."

The court of last resort of Maryland had the question before it in the case of *Lowes v. Carter*, 124 Md. 678, 93 Atl. 216, and there said:

"In holding that covenants creating such limitations may, if they manifest that intent, be enforced against the grantees of the original covenantors, the decisions we have cited on that subject have uniformly indicated that such a right could be asserted only against those acquiring title with notice of the restrictions. This was recognized as a reasonable and just qualification to be mentioned in connection with a statement of the general rule, but in none of the cases referred to was any intimation required or given as to the nature of the notice which would be necessary and sufficient to charge the assigns of the grantor with the observance of the covenant. In each instance the party sought to be bound by the restrictive conditions appeared to have actual knowledge of their terms. It was therefore not essential in the former cases to decide whether constructive notice was sufficient to support such a liability, and that question is now presented to this court for the first time. * * *

"The covenant in question undoubtedly vested in the grantee a substantial interest in the reserved real estate. The right conferred, as appurtenant to the granted lot, to enforce the prescribed method of improvement as to the remaining parcels, was a valuable and important consideration for the purchase. It was the evident design of the parties the interest or easement thus contracted for should be securely vested in the vendee and given all the protection which the law affords. To that end the covenant was inserted in the deed for the lot, to which the right was appurtenant, and placed upon the public land records. The statute does not require that such an agreement shall be recorded in the form of a separate instrument. The method adopted was practical and appropriate and was authorized by the law as a means of safeguarding the rights created by the deed against adverse interests of later origin. In our opinion, this purpose has been accomplished in the present case. As the appellee

obtained his title through the foreclosure of a mortgage which was executed after the easement which he is now contesting had become a matter of public record, he is chargeable with implied notice of its existence and effect, and must be held to have acquired his property subject to the conditions thus imposed."

The Supreme Court of Missouri has likewise had the question under consideration in *King v. Union Trust Co.*, 226 Mo. 351, 128 S. W. 415. After considering some of the cases, it is said:

"From this decision, and the Maguire Case referred to therein, it is clear that a purchaser is affected with constructive notice of all duly-recorded conveyances by his grantor affecting the latter's title; and the deed to Mrs. Sweringen did affect the grantor's title in this, that the grantor could not convey any of the lots in 'Rex subdivision' save subject to the restrictions and conditions set out in the deed to Mrs. Sweringen. In that deed the grantor covenanted 'that it will not at any time thereafter convey or otherwise dispose of any lot in Rex's subdivision except upon and subject to such restrictions and conditions as are hereinbefore mentioned, and as are common to all the lots in said subdivision.' The rule is that a recital in a deed of a fact will generally conclude the grantor and his privies."

The court then considers some further authorities and concludes on this subject:

"The foregoing decisions, and many more which we might cite, but with which we do not deem it necessary to burden this opinion, make it clear to our mind that the defendant was bound by the covenants and restrictions in the recorded deed of the Rex Realty Company to Mrs. Sweringen, and of which the defendant must be held to have constructive notice."

The question was also considered and decided in *Holt v. Fleischman*, 75 App. Div. 593, 78 N. Y. Supp. 647. We quote from the syllabus:

"Plaintiff's grantor, owning several adjoining lots, conveyed a part of the property to plaintiff under a deed containing a covenant providing that, on the improvement of her adjoining lots, the houses erected thereon should be on a line with the fronts of the present adjoining houses annexed thereto, which deed was duly recorded; and defendant acquired title to such adjoining property under a deed in partition between the heirs of such prior grantor. Held, that defendant was bound to take notice of the record of plaintiff's deed, and was therefore bound by the restrictive covenant therein contained, imposing an easement on the adjoining property."

Upon principle we think the rule adopted by Mr. Tiffany and the Maryland, Missouri, and New York courts is the correct one. By the deeds executed by Mrs. Wilcox a negative easement was by her placed upon lot 2. When these deeds were placed on record this gave constructive notice of that negative easement. Defendant the

Shelbourn Company was not a bona fide purchaser and took subject to the rights of the plaintiffs.

Upon the argument it was pointed out that the Shelbourn Company had expended some money and entered into engagements for the carrying out of the plan of converting the Wilcox home into a restaurant. But there has been no laches on the part of plaintiffs. As soon as they learned of the sale they at once took up the matter with Mr. Wilcox and the officers of the company. Failing by negotiations to secure their rights, this bill was filed.

The decree will be affirmed, with costs.¹

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SECTION V

MARSHALLING

DAY AND DAY v. MUNSON, SPEAR ET AL.

14 Ohio St. 488. 1863.

RESERVED in the District Court of Cuyahoga County.

This action was instituted by the plaintiffs, to enforce the liens which they claim were secured to them by two mortgages upon certain chattel property, executed by the defendants, Munson & Spear, to secure certain indebtedness to them.

The Cleveland Paper Mill Company, as the assignee of T. L. Wilcox, to whom a mortgage was executed upon the same property substantially, and Younglove & Hoyt, who likewise received from said Munson & Spear a mortgage on the same property, were, among others, made parties.

The dates, times of filing and refiling, and the amounts due on each of these mortgages, on the — day of September, 1861, as found by the District Court, are as follows:—

1. First mortgage to the plaintiffs, dated December 12, 1857, filed February 16, 1858; refiled March 22, 1859; amount \$995.
2. Second mortgage to the plaintiffs, dated July 3, 1858, filed July 6, 1858; refiled July 7, 1859; amount \$467.56.
3. Mortgage to Wilcox, dated July 6, 1858, filed July 6, 1858; refiled July 1, 1859; amount \$54.17.
4. Mortgage to Younglove & Hoyt, dated October 28, 1858, filed October 28, 1858; refiled October 14, 1859; amount \$949.75.

The pleadings and the findings of the District Court, show that the Wilcox mortgage had originally been given, with full knowledge, on the part of Wilcox, of plaintiffs' mortgages, to secure the payment of \$1000, due from Munson & Spear; that on the 30th December, 1858, Wilcox assigned said mortgage to defendant Warren to

¹ Compare *Smith v. Lockwood*. 100 Minn. 221.

secure the amount then due Warren from found, as above, to amount to \$54.17, (ber, 1861), also, to secure any future advances for Wilcox, or liabilities which he on the first of January, 1859, Wilcox property from Munson, subject to the ing to pay them off, except the one to him ber, 1859, Warren made advances for him to the amount, with interest to 1861, of \$408.44. That the remainder subsequent to the commencement of this at the request of Wilcox, to the Lake who are now the owners of any benefit there.

The amount which may ultimately be property, is yet uncertain; but there is no proceeds of its sale will be insufficient due to the plaintiffs on their two mortgages to Warren, as the assignee of the Wilcox due Younglove & Hoyt under their mortgages. The adjustment and determination of these mortgagees, the questions of law are by the District Court, and shown by the facts for the decision of this court.

SCOTT, J. The first question arising from force of the Statute, the plaintiffs' mortgages refile them within one year from the time void as against Younglove & Hoyt, who and filed within the year, and who receive notice of plaintiffs' mortgages.

The fourth section of the Act requiring of personal property to be deposited with that, "Every mortgage so filed, shall be void of the person making the same, or against mortgagees in good faith, after the expiration thereof, unless, within thirty days of the said term of one year, a true copy together with a statement exhibiting the interest in the property at the time last aforesaid, and mortgage, shall be again filed in the office."

The first section of the same Act provides that goods and chattels, not accompanied by actual and continued change of possession to creditors, and subsequent purchasers, and unless the mortgage, or a true copy thereof deposited, &c.

The question in this case turns upon the meaning of the expression "subsequent purchaser in good faith," as used in these sections.

It is well settled, in New York, under a Statute substantially similar, and from which our own has been mainly copied, that to constitute "good faith" on the part of the subsequent mortgagee, there must be the absence of actual notice of the existence of the prior mortgage. And so it was held by this court, in *Paine et al. v. Mason et al.*, 7 Ohio St. Rep. 198. In that case, it was also held, that constructive notice alone, of the prior mortgage, would not constitute *mala fides* on the part of the subsequent mortgagee; and that as against him, the priority of the first mortgage could not be retained, without refileing pursuant to Statute.

That decision, unless overruled, must be fatal to the claim of the plaintiffs in this case. We are accordingly asked to reconsider the question thus decided, on the ground that the court, in that case, assumed, without full consideration, that the term "subsequent" in each of these sections had relation to the same thing; that is, to the time of the execution of the mortgage declared to be void; whereas the policy of the Statute requires the term "subsequent," in the fourth section of the Act, to be construed as relating to the expiration of the year within which the refileing is required. And in support of this view, we are referred to the case of *Meach v. Patchen*, 4 Kernan 71, in which it was so held by the Court of Appeals of New York (Mitchell, J., dissenting). The decision of the majority of the court, in that case, is supported by reasoning, which is, certainly, not without force. But it is a construction given to the Statute *after* its adoption in this State, and in opposition to the opinion expressed by Justice Cowen, in *Gregory v. Thomas*, 20 Wend. 19, *prior* to the enactment of the Statute in this State. This latter opinion, it is true, was of an *obiter* character, but I am not aware of any New York decision to the contrary, prior to the enactment of our own Statute. Subsequent decisions, which could not have been before the mind of the Legislature, can throw no light on its intentions. Besides, the phraseology of the fourth section of the Statute of this State differs somewhat from that of the corresponding section in the New York Act, and is such that the term "subsequent," in the fourth section, cannot well be regarded as referring to any later point of time than the original filing of the mortgage. The language is, "Every mortgage so filed shall be void, as against the creditors of the person *making* the same, or against *subsequent* purchasers or mortgagees in good faith," &c. Subsequent to what? The phraseology would import, subsequent to the *making*, or to the *filing* of the mortgage, which are the only acts previously spoken of. As the term refers clearly to the making of the mortgage in the first section, it should not, without strong reason, be differently construed in the fourth. And we think it by no means clear, that the policy of the Act designed to place a mere creditor on a better footing than a *bona fide* mortgagee, in respect to the laches of a prior mortgagee.

Where a subsequent mortgage is taken in good faith, and without

actual notice of a prior one, no satisfaction of the rights of its owner should depend on one day before, or one day after, the law. In either case, the Statute may reasonably be construed to the benefit of the mortgagees as to that of the mere creditor.

Besides, no disapprobation of the construction in the case of *Paine v. Mason*, has been made by the legislature; and when to this acquiescence is added the consideration, that a decision which has been long on as an established rule of property, is now ruled, and the law be thereby rendered that the former decision of this question in this State, until changed by legislative action.

The case, then, stands thus: The plaintiffs have been refiled, pursuant to Statute, are void as to the third mortgagees; but the plaintiffs prevail over Warren, who holds under Wilcox, whose mortgage was taken with actual notice of the mortgages. Warren's lien under the Wilcox is superior to that of the third mortgagees, and is superior to the *liens* of the plaintiffs. The plaintiffs' *liens* affect the rights of the third mortgagees; but the plaintiffs to affect the rights of the second mortgagees; these conditions leave to the plaintiffs the result will be, if the fund is insufficient for the satisfaction of the mortgages, that the third mortgagees, Young & Co., get so much of the fund as would be applicable to satisfying Warren's prior lien. Warren's lien is superior to the fund as would be applicable to the plaintiffs, leaving the third mortgage out of the question of the plaintiffs' priority of lien. And the plaintiffs get the residue.

The case will, therefore, be remanded to the court for decree and distribution pursuant to the decree of the court, and for such further decree as may be required.

BRINKERHOFF, C. J., and WILDER and
RANNEY, J., having been of counsel, did not concur.

¹ See *Goodbar v. Dunn*, 61

SAYRE v. HEWES AND OTHERS

32 N. J. Eq. 652, 33 N. J. Eq. 552.¹ 1880, 1881.

On final hearing on bill, answer and proofs.

THE VICE-CHANCELLOR. [VAN FLEET.] This is a strife for position. The facts material to the controversy are as follows: On the 3d of December, 1877, Mrs. Margaret V. Hewes executed a chattel mortgage on certain chattels, then being in a building in the city of Newark, to Francis M. Hoag, and the mortgage was, on the same day, filed in the office of the register of the county of Essex; a second mortgage on the same chattels was executed by Mrs. Hewes to Frederick Fisher, February 14th, 1878, which was filed March 2d, 1878, in the office of the register of Hudson County; a third mortgage was executed by Mrs. Hewes to the complainant (Edward Sayre), on the same chattels, February 25th, 1878, which was also filed in the office of the register of Hudson County on the day of its date; on the 27th of February, 1878, the complainant recovered a judgment against Mrs. Hewes, by confession, in the Essex County Circuit Court, and another judgment was recovered against her, by confession, in the same court, by Albert H. Hewes, on the 2d of March, 1878. Executions were immediately issued upon these judgments, and levies made upon the chattels covered by the three mortgages. Albert H. Hewes assigned his judgment to the complainant immediately after its recovery. No consideration was paid for the assignment. The complainant and Frederick Fisher knew, when they received the mortgages made to them, that Mrs. Hewes had previously executed a mortgage to Mr. Hoag. They are subsequent mortgagees with notice of the antecedent mortgage.

Neither of the complainant's securities is founded on a debt actually existing at the time it was obtained. Both were given for the same purpose. The complainant had become surety for Mrs. Hewes, on a bond given by her to the ordinary, in 1874, on obtaining a letter of guardianship for one of her children. The mortgage executed to him, and the judgment recovered by him, were intended, as he testifies, to secure him against loss in consequence of his contract of suretyship for her. Prior to getting these securities, he had paid nothing on account of that contract; he neither paid anything, nor expressly bound himself to stand as principal in that contract, at the time he obtained these securities, and he has paid nothing since, nor incurred any new or additional obligation. The mortgage and judgment were without other consideration than the complainant's contingent liability as such surety. No debt actually existed at the time they were obtained, and none has subsequently been created. In the papers, the complainant has styled himself

¹ In the latter court *sub nom.* Hoag v. Sayre.

trustee of Mrs. Hewes' ward, but his act of law, is a mere piece of assumption. he had no authority to constitute himself, thus, in virtue of his own act, without himself to bear the whole burden of her position where he is entitled to be received by the holders, as a creditor invested with the same. Mrs. Hewes remained guardian, she was the ward, and her sureties had no right for her, to assume the position of creditor to her ward's estate.

The mortgages, it will be observed, were — those given to the complainant and Mr. Hoag in Hudson, and that given to Mr. Hoag mortgaged were, at the time the mortgages were made, in the county of Essex. The residence of the mortgagor, from the evidence, I think, leaves little ground to where it must be adjudged to have been at the time her husband died in 1873. At the time of his death, she resided in Kearney Township, Hudson County. She continued to occupy the house in which she resided for portions of each winter thereafter, up to the winter of 1877, in the city of Newark, sometimes taking three or four rooms, but keeping her dwelling in Newark, she and her family going there whenever she continued to reside in her house in Kearney Township. In the winter of 1877 and 1878, and on the day she was executed, she walked from her house in Newark to execute it. If it be taken as true that, when she executed the mortgage, she declared Newark to be the place of her residence, the weight of the evidence does not, however strong that such a declaration was made), still, it cannot affect the rights of the complainant. It is not what did she say respecting the place of her residence at the time she executed that mortgage, but where she actually resided. His rights must be controlled by the evidence of her representation. The evidence shows, conclusively, that in Hudson County when all three mortgages were made.

It is clear, then, that Mr. Hoag's mortgage was made in the county where he was required by law to execute it, for the validity against the creditors of the mortgagor, and against subsequent purchasers and mortgagees in good faith, the point is plain and imperative. Unless the mortgage was made in the county where the mortgagor resides (if it was made at the time of its execution, or the mortgagor resided at the time of the execution of the mortgaged chattels, and continued in constant possession of them, it is absolute).

creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith. Rev. p. 709, §§ 39, 40; *De Courcey v. Collins*, 6 C. E. Gr. 357.

The complainant is clothed with a dual character; he is both a creditor and a subsequent mortgagee. He is not, however, a subsequent mortgagee in good faith. He knew, when he took his mortgage, that a prior mortgage had been given, and any attempt by him to dislodge that mortgage from its position of superiority, in consequence of the failure to file it in the proper county, is, in equity, an act of bad faith. His mortgage must therefore be awarded a position subordinate to that held by the mortgage to Mr. Hoag. He stands, however, as a judgment creditor, on a much higher plane. The Statute makes an important distinction between creditors and subsequent purchasers or mortgagees. Purchasers or mortgagees, to be in a position to avail themselves of an omission by an antecedent mortgagee, must have acted without notice of the rights of the holder of the antecedent security; but not so with creditors. A creditor may know that an antecedent mortgage has been given, yet if it is not filed according to the requirement of the Statute, and he obtains a judgment and procures a levy to be made, his lien, by force of the Statute, is entitled to preference in payment. This is the rule plainly prescribed by the Statute. Had the meaning of the Statute ever been thought to be open to doubt, its construction is now so authoritatively settled as to be no longer open to discussion in this court. *Williamson v. N. J. Southern R. R. Co.*, 2 Stew. Eq. 336; s. c. 1 Stew. Eq. 278.

To what extent, then, is the complainant a creditor? Is he entitled to that position in virtue of both of his judgments, or only one? The judgment he holds under assignment from Albert H. Hewes does not seem to be open to any valid objection. It was founded on a just debt, actually existing at the time it was confessed. The defendant Hoag cannot impeach the complainant's title because he paid nothing for it. The judgment creditor had an unquestionable right to assign it, with or without a consideration, just as he pleased. That is a matter which concerned him alone. The fact that the assignment was gratuitous, is only important as it may serve to show whether the foundation of the judgment was honest or fraudulent. Under the evidence, there can be no doubt that it is supported by a just debt.

As already intimated, the complainant's right to occupy the position of a judgment creditor, as against other lien-holders, under the judgment confessed to himself, has little to support it in a court of equity. Is he a creditor in the sense in which that term is used in this Act? It is certain that no debt was due to him for which he could have maintained an action. At the time of his recovery, he had no legal or just cause of action against the defendant. At common law, a judgment may be confessed to secure a debt to be subsequently

created, but suppose the consideration promised, is never furnished, would a court of equity permit the judgment to be collected, or give such a judgment creditor a superior position against an unfilled antecedent mortgage, the existence of which was known to him when he obtained his judgment?

Besides, I think I am bound to consider the doctrine as settled, so far at least as this court is concerned, that a judgment on bond and warrant of attorney, under our Statute, can only be entered for a debt actually existing at the time of its entry, and that a simple liability as indorser or surety does not constitute such a debt. "It is an abuse of language to say," says Chancellor Halsted, "that because I indorse your note to-day, payable three months hence, to be used by you, you are indebted to me to-day for the amount of it." *Blackwell v. Rankin*, 3 Hal. Ch. 160. But the decisive authority on this point is the judgment of the Court of Errors and Appeals, in *Clapp v. Ely*, 3 Dutch. 555. It will be remembered that, in that case, it was finally held, by a divided court, it is true, after repeated and exhaustive discussion by counsel as able as any that ever adorned the bar of this State, and after the best consideration that could be given by the court to any case, that a valid judgment could not be entered, under our Statute regulating the recovery of judgments by confession on bond and warrant of attorney, to secure future advances, or a debt to be subsequently created. A single quotation from the masterly opinion of Chief Justice Green will present the important ruling of that case, which, I think, must control this. He says, "Under the law of this State, no judgment by confession can be entered, except for a demand founded on a legal consideration, and for a debt justly due and owing at the time of the entry of the judgment." These considerations, I think, effectually dispose of the complainant's claim to be regarded as a judgment creditor, as against the other lien-holders, in respect to the judgment confessed to himself.

But if it were possible to hold that the complainant was entitled to be treated as the holder of a valid security for future advances, it is not perceived how that would give him the least advantage in this controversy. The general rule in respect to such securities is well established. They are only entitled to priority over subsequent encumbrances to the extent of the sums actually advanced prior to actual notice of the subsequent encumbrance. *Ward v. Cook*, 2 C. E. Gr. 93; *Kline v. McGuckin*, 9 C. E. Gr. 411. Here nothing, up to this time, has been advanced, and the complainant cannot, therefore, in equity, lay claim to the rights of a creditor.

This disposes of the case so far as it involves merely the rights of the complainant and Mr. Hoag, and without reference to the rights of Mr. Fisher. But his rights must also be considered. He took his mortgage with notice that a prior mortgage had been given to Mr. Hoag, and he must, therefore, as between Hoag and himself,

take the subordinate position. But he and complainant, as between themselves, occupy equal rank; the judgment of the one, and the mortgage of the other, were recovered and filed on the same day. So that the relative positions of the several parties are as follows: The complainant and Fisher, as between themselves, hold concurrent liens, but Hoag stands prior to Fisher as between Fisher and himself, and the complainant, as between Hoag and himself, stands prior to Hoag. In this condition of affairs, it is impossible to give the complainant the full benefit of the superiority of his position over Hoag, without advancing him to the front against everybody. The fact that the complainant's position is superior to that of Hoag, and that Fisher's is subordinate to that held by Hoag, raises the complainant above Fisher as well as Hoag. Where a third encumbrancer acquires a right of priority as against the first, but the act or omission from which such right flows does not change his relative position towards the second, yet, as it is impossible to put him in advance of the first, without also advancing him over the second, his lien must, of necessity, be advanced to the first position as against both the first and second encumbrances. *Clement v. Kaighn*, 2 McCart. 47.

The decree will declare the liens of the parties to stand in the following order: The complainant shall be first paid the amount due on the judgment assigned to him by Albert H. Hewes; the defendant Hoag shall next be paid the amount due on his mortgage; and, lastly, Fisher shall be paid the amount due on his mortgage. If a surplus remains, it must be brought into court to await the determination of the question whether the complainant or Mrs. Hewes is entitled to it.

On appeal from a decree advised by the Vice-Chancellor, and reported in *Sayre v. Hewes*, 5 Stew. Eq. 652.

On the 3d of December, 1877, the appellant, Hoag, obtained a chattel mortgage on the goods in question. This mortgage was not recorded in the proper county; it was to secure \$2,150. On the 14th of February, 1878, Frederick Fisher, having knowledge of the prior mortgage, took a second mortgage on the same property to secure \$1,160. Edward Sayre holds a judgment by confession against the mortgagor for \$6,000 debt and \$4 costs, which was entered on the 27th of February, 1878. Execution on this judgment was duly taken out and levied.

The opinion of the court was delivered by

BEASLEY, C. J. I agree with the Vice-Chancellor in his settlement of the disputed facts in this case, but it seems to me that an error has crept into the decree with respect to the marshalling of the encumbrances. These liens are of this character: the mortgage first in date is held by the appellant, Hoag; then comes a mortgage held by Frederick Fisher, one of the defendants; and lastly is the judgment of the defendant Sayre. This first mortgage was not re-

corded in the proper county, and there judgment, but it is paramount to the same taken with knowledge of the existence of the state of things, the decree places the judgment, by way of preference, before the same. It seems to me, is unjust and inadmissible.

Upon what possible principle is the result justified? Fisher, when he took his mortgage, had an antecedent mortgage on the same property for \$2,150, with interest. He had his own mortgage so that it became incontestably the second of affairs this judgment is entered, and without any fault on his part, degraded from an encumbrancer to that of a third encumbrancer mortgaged property being subject to a claim for \$2,150, it is subject to paramount claims of \$5,150. If such a principle be correct, any person, under any circumstances, can subordinate a mortgage upon property, with the result in the utmost jeopardy. Under the prevailing rule a subsequent encumbrancer would be obliged to stand off the primary encumbrance was, in all cases, under penalty, if a flaw should be detected in the judgment. A rule would be as inexpedient as it would be unjust.

I cannot but think that any one who is conversant with the subject will perceive that no rule applicable to the case can be admissible that is not founded on the principle that the second mortgagee in the position originally occupied by the first mortgagee, with respect to the neglects or shortcomings of the first mortgagee or the subsequent judgments of the court, this would be the result: the judgment of the court, the marshalling of these liens, take priority between the judgment and that mortgage first paid. But with respect to the second mortgagee, as such, has no claim to stand first in regard to his right to stand in the shoes of the first mortgagee and assert all the privileges incident to the first mortgage. He has the exact nothing further than such privileges as the first mortgagee has. He has the paramount lien on the property secured by the first mortgage; but he cannot, with respect to the second mortgagee, he has any claim. No additional burden can be put upon the first mortgagee. If the judgment of the court is in favor of the first mortgagee, the judgment of the court, such judgment will constitute the first judgment and no further, of the first mortgage; if it

the first mortgage, it will take precedence and consume the first mortgage to that extent only. It will be observed that by these adjustments the priority of the first mortgage, with regard to the second mortgage, will be exhausted, either partially or wholly, so that, to the extent of such exhaustion, it will be postponed to the second mortgage.

The doctrine thus propounded is but the development of the principle maintained and acted on in *Clement v. Kaighn*, 2 McCart. 48. In that case there was a judgment without an execution; then a mortgage, and then judgments on which executions had been taken out. These latter judgments were entitled to precedence over the first, but were subordinate to the mortgage. Chancellor Green decided that the first judgment on the mortgaged premises, by reason of the failure to sue out execution upon it, should be postponed to the encumbrance of the junior judgments, and, as an inevitable consequence, that it should be postponed to the mortgage which was prior to the junior judgments, and whose priority was not to be affected by any laches of the holder of such prior judgment.

In my opinion, the decree in this case should be modified so as to direct the payment of these encumbrances in this order, viz.: first, the judgment of Sayre to the amount secured by the first mortgage; second, the payment of the residue of such judgment and the second mortgage, *pari passu*, as they were concurrent liens, being entered on the same day; third, the payment of the first mortgage.

DIXON, J., dissenting.

I agree with the conclusions which the Vice-Chancellor has reached upon the facts.

But I dissent from the legal rule by which he fixes the order of priority, for I do not think it necessary to advance the complainant Sayre to the front against everybody, in order to give him the full benefit of his superiority to Hoag.

Nor do I assent to the rule laid down in the opinion just read, since I see no reason for regarding the complainant as substituted in the stead and rights of Hoag as against Fisher, merely because Hoag failed to comply with the registry laws. The effect of non-compliance with those laws is declared by themselves to be, not that the rights of him in default shall be transferred to the subsequent encumbrancers, but that his claim shall be void as to them.

Therefore, if there be three encumbrancers, A, B and C, in the order of time, and A's lien be prior to B's, and B's to C's, but, for A's omission to properly register his lien, it is void as to C's, then the fund should be disposed of as follows:—

1. Deduct from the *whole fund* the amount of B's lien, and apply the balance to pay C. This gives C just what he would have if A had no existence.

2. Deduct from the *whole fund* the amount of A's lien, and apply the balance to pay B. This gives B what he is entitled to.

“The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidences of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and a certificate thereof delivered to him. In the other, the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered. Necessarily the initial registration of title—that is, the conclusive establishment of a starting point binding upon all the world—must rest upon judicial proceedings.’ *Per* START, C. J., in *State v. Westfall*, 85 Minn 437, 438 (1902).

“All subsequent transfers or incumbrances, whether voluntary or involuntary, are effected by the issue of a new certificate or by suitable notation upon the old certificate referring to the instruments of conveyance, which are filed but not spread upon the records. Any doubt as to the effect of a document of title presented for registration is settled by the court or its officials. In all cases the operative act as to title is that of registration and no title can be obtained by prescription or adverse possession.

“Generally, by special assessment on each registration, a fund is provided from which any one improperly deprived of an interest in the land by the original registration or by subsequent transfer may obtain indemnity.

“The constitutionality of the statutes in this country has not been passed upon by the Supreme Court of the United States, nor has the validity of many provisions been adjudicated in the State courts. The Illinois act of 1895 was declared unconstitutional by the State court because it delegated judicial functions to the register, a ministerial officer, in the determination of ownership of land on the initial registration. *People v. Chase* 165 Ill. 527 (1897). An amended law, passed in 1897, has been upheld as to this point and as to its general provisions. *People v. Simon*, 176 Ill. 165 (1898). An act passed in Ohio in 1896 was held invalid as permitting the taking of property without due process of law because no notice except by publication was required except as to parties whom the applicant might choose to name in his petition. The provision for indemnity from an insurance fund was held not to be a valid substitute. *State v. Guilbert*, 56 Oh. St. 575 (1897). The Massachusetts act of 1898 was upheld in a petition for a writ of prohibition by a majority of the court in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71 (1900). The Supreme Court of the United States refused to take jurisdiction of the case on writ of error because it was not brought by one who had been deprived of property under the law. 179 U. S. 405 (1900). The general system as adopted in Minnesota has there been held constitutional. *State v. Westfall*, 85 Minn. 437 (1902).” 6 Gray, Cas. on Prop., 2d ed., pp. 380-381. See *Drake v. Fraser*, 179 N. W. (Neb.) 393. Compare *Shevlin-Mathieu Lumber Co. v. Fogarty*, 130 Minn. 456.

“The Torrens System of land registration would seem to be an ideal method of securing stability in ownership of realty. The old system of recording merely transfers left, as every conveyancer knows, the security of land transactions often in doubt, and the purchaser at the mercy of some forgotten heir or neglected dower interest. All this is done away with by the decree of court, after due notice and other formalities, declaring title to be in the registrant, and all other claims barred forever. The state, to be sure, ordinarily guarantees out of funds supplied by fees that claimants barred through negligence or omission of the registrar shall be indemnified. But such mistakes do not affect the title.

“The expense of the system, however, renders resort to it by no means universal, and indeed for many titles it is unnecessary. It seems to be most serviceable in three classes of cases. *First*: Certain classes of city property which change hands frequently or are often mortgaged. The registered title passes easily from hand to hand, and also may be as liquid a security as a

stock certificate. These titles it is cheaper and thus to avoid the expense and delay of a chaser who is unwilling to rely on any lawyer constantly the prey of vague, shadowy claims. familiar local assertion of rights of way over By registration these incumbrances are destroyed. *Third:* Certain country property where it boundaries. Much of the work of the registrar introduction of new lines of street railways hitherto vacant and of little value has begun by the acre. Nevertheless, much land will not for instance, residential rural or urban property Here it is cheaper and often as safe to rely on L. Rev. 297.

CHAPTER XII

ESTOPPEL BY DEED¹

LITT. § 446. Also, these words which are commonly put in such releases, *scilicet* (*quæ quovismodo in futurum habere potero*) are as void in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and sonne, and the father be disseised, and the sonne (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c. and after the father dieth, &c. the sonne may lawfully enter upon the possession of the disseisor, for that hee had no right in the land in his father's life (*pur ceo que il n'avoit droit en la terre en la vie son pier*) but the right descended to him after the release made by the death of his father, &c.

Co. LIT. 265 a. Note, a man may have a present right, though it cannot take effect in possession, but *in futuro*.

As hee that hath a right to a reversion or remainder, and such a right he that hath it may presently release. But here in the case which *Littleton* puts, where the sonne release in the life of his father, this release is void, because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the sonne shall enter into the land against his owne release.

The baron makes a lease for life and dieth, the release made by the wife of her dower to him in reversion is good, albeit shee hath no cause of action against him *in præsentî*.

"*Without clause of warrantie.*" For if there bee a warrantie annexed to the release, then the sonne shall be barred. For albeit the release cannot barre the right for the cause aforesaid, yet the warranty may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warrantie being a covenant reall should barre a future right, is for avoiding of circuitie of action (which is not favoured in law); as he that made the warrantie should recover the land against the ter-tenant, and he by force of the warrantie to have as much in value against the same person.

¹ On the subject of this chapter see Rawle, *Covenants for Title*, 5th ed., c. 11.

DOE d. CHRISTMAS AND OTHERS v. OLIVER

10 B. & C. 181. 1829.

BAYLEY, J.¹ This case depended upon the effect of a fine levied by a contingent remainder-man in fee. Ann Mary, the wife of Joseph Brooks Stephenson, was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes; and she and her husband conveyed the premises to Thomas Chandless for ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living, so that the contingency upon which the limitation of the fee to Mrs. Stephenson depended, happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term for ninety-nine years was vested. It was conceded upon the argument that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them by estoppel; but it was insisted that such fine operated by way of estoppel only; that it therefore only bound parties and privies, not strangers; that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy, but a stranger; and that as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. To support this position, the defendant relied upon the latter part of the judgment delivered by me in *Doe dem. Brune v. Martyn*, 8 B. & C. 497; and that part of the judgment certainly countenances the defendant's argument here. The reasoning, however, in that case, is founded upon the supposition that a fine by a contingent remainder-man operates by estoppel, *and by estoppel only*; its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision: whether it operated by estoppel only, or whether it had a further operation, was quite immaterial in that case; and the point did not there require that investigation, which the discussion in this case has made necessary. We have, therefore, given the point the further consideration it required, and are satisfied upon the authorities, that a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel only, but that it has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the cognizors at the time the fine was levied.

In *Rawlin's Case*, 4 Co. 52, Cartwright demised land, not his, to Weston for six years; Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten; and it was resolved that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion;

¹ The opinion only is given.

and when Rawlins re-demised to him, then was his interest *bound by the conclusion*; and when Cartwright re-demised to Rawlins, now was Rawlins concluded also. Rawlins, indeed, is bound as privy, because he comes in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright gets the land, his interest in it is bound. In *Weale v. Lower*, Poll. 54, A.D. 1672, Thomas, a contingent remainder-man in fee, leased to Grills for five hundred years, and levied a fine to Grills for five hundred years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and whether this lease was good against the heir of Thomas was the question. It was debated before Hale, C. J., and his opinion was, that the fine did operate at first by conclusion, and passed no interest, but bound the heir of Thomas; that the estate which came to the heir when the contingency happened fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied; and he cited *Rawlins's Case*, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord C. J. Hale, Wild, Ellis, and Windham, Justices, and they all agreed that the fine at first inured by estoppel; but that when the remainder came to the conusor's heir, he should claim in nature of a descent, and therefore should be bound by the estoppel; and then the estoppel was turned into an interest, and the cognizee had then an estate in the land. In *Trevivan v. Lawrence*, 6 Mod. 258; Ld. Raym. 1051, Lord Holt cites 39 Ass. 18, and speaks of an estoppel as running upon the land, and altering the interest of it, — as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick v. Edwards*, 3 P. Wms. 372 (1735), Lord Talbot must have considered a fine by a contingent remainder-man as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. In that case, lands were devised to A. and B. and the survivor of them, and the heirs of such survivor, in trust to sell: the master reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the master's report, Lord Talbot held, that a fine by the trustees would pass a good title to the purchaser by estoppel; for though the fee were in abeyance, it was certain one of the two trustees must be the survivor, and entitled to the future interest; consequently, his heirs claiming under him would be estopped by reason of the fine of the ancestor to say, *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. And the next day he cited *Weale v. Lower*. Now, whether Lord Talbot were right in

treating the fee as in abeyance, and the and his heirs as a contingent remainder so consider them; and he must have had would have operated not by estoppel only estate to the purchaser, because, unless as well as the former, it could not pass a

In *Fearne, c. 6, § 5* (edit. 1820, p. 365 member, however, that a contingent remainder be passed by fine by way of estoppel, so a shall afterwards accrue by the contingent facts in *Weale v. Lower*, he says, it was remainder descended to the conusor's l operated at first by conclusion, and passed bound the heir; and that upon the contingent became an estate in interest, of the same had happened before the fine was levied.

Upon these authorities we are of opinion had a double operation, — that it bound M estoppel or conclusion so long as the contingent when the contingency happened, the estate Mrs. Stephenson fed the estoppel; the estate way of estoppel, ceased to be an estate by an interest, and gave Mr. Chandless, and him, exactly what he would have had, had before the fine was levied.

RIGHT d. JEFFREYS v. BUCKNE

2 B. & Ad. 278. 18

THIS case was argued during the last term tiffs, and *Preston* for the defendants, before LITLEDALE, J., TAUNTON, J., and PATTER case, the arguments urged, and the author stated and commented on in the judgment that it is deemed unnecessary to detail the

LORD TENTERDEN, C. J., in the course of judgment of the court: —

This case came on upon a motion to enter before the *Lord Chief Justice Tindal*, at the County of Kent, 1830, it appeared that t

¹ On the transfer of contingent remainders and interests by estoppel, see *Smith v. Carroll*, 286 Ill. 340, 348; *Kales, Estates and Future Interests*, 5

recover two houses at Brompton in the parish of Chatham. As to one the learned judge was of opinion, that the ejectment would not lie for want of a notice to quit. As to the other, there was a verdict for the lessors of the plaintiff, subject to leave to enter a nonsuit. The facts proved were, that Thomas Jarvis the elder, having contracted to purchase the premises, was let into possession by order of the Court of Chancery on the 29th of December, 1808; and being let into possession, but never having had any conveyance executed to him, he afterwards, on the 2d of October, 1820, devised them to his son and heir, Thomas Jarvis the younger. Upon his father's death the son entered, and on the 21st of January, 1823, he mortgaged the premises, by indentures of lease and release, to the lessors of the plaintiff. The lease and release were in the common form, excepting that in the latter there was a recital that the said Thomas Jarvis is legally or *equitably* entitled to the several messuages or dwelling-houses conveyed, and in the covenant for title, the releasor covenanted that he is and standeth lawfully or *equitably*, rightfully, absolutely, and solely seised in his demesne as of fee of and in, and otherwise well entitled to the said several messuages or dwelling-houses, &c. On the 1st and 2d of April, 1824, indentures of lease and release, under the contract of sale in 1808, were executed to Thomas Jarvis the younger, whereby he became seised of the legal estate in the premises, which he afterwards conveyed by mortgage, for a valuable consideration, to the defendant Henry Bucknell. There was no proof that Bucknell had any notice of the prior mortgage, and upon his mortgage all the title-deeds were delivered to him. In this action, he had come in under the common rule, and defended as landlord; the other defendants were the tenants in possession.

The question on which the court took time to consider was, whether the defendant, claiming under the mortgagor, Thomas Jarvis the younger, could set up as a defence against the lessors of the plaintiff, the legal estate acquired by him since their mortgage. And it has been argued for them that he, as representing the mortgagor, Thomas Jarvis, is estopped from doing so; and for this purpose, Co. Lit. 352 a; Lit. § 693; and the cases of *Bensley v. Burdon*, 2 Sim. & Stu. 519; *Helps v. Hereford*, 2 B. & A. 242; *Goodtitle v. Morse*, 3 T. R. 365; *Goodtitle v. Bailey*, Cowp. 597; *Goodtitle v. Morgan and Others*, 1 T. R. 755; *Doe d. Christmas v. Oliver*, 10 B. & C. 181; *Trevivan v. Lawrence*, 1 Salk. 276; 2 Ld. Raym. 1048, s. c.; and *Taylor v. Needham*, 2 Taunt. 278, were cited. Of these cases none are applicable to the point in question, except *Goodtitle v. Morgan* and *Bensley v. Burdon* (of which more presently), and *Helps v. Hereford* and *Doe v. Oliver*. The last two are cases of estoppels, arising out of fines levied before any interest vested; and there is no doubt that a fine may operate by way of estoppel, but the present is not the case of a fine. In § 693, Littleton, speaking with reference to the doctrine of remitter, says, "This is a remitter to him, if such taking

ment, 5 Russell's Ch. Rep.,¹ but put it on this solely, that it was an allegation of a particular fact, by which the party making it was concluded. That case, therefore, greatly differed from the present, in which there is no certain precise averment in the deed of release of any seisin in T. Jarvis the younger, but a recital only, that he was legally or equitably entitled. We think, therefore, that this recital does not operate by way of estoppel.

We are of opinion, also, that the release whereby T. Jarvis granted, bargained, sold, aliened, remised, released, &c., the premises, does not by mere force of these words amount to an estoppel. Littleton lays it down, § 446, that "no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath, or may have, in the same tenements, without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseisor." To the same effect is *Wivel's Case*, Hob. 45, and Perk. § 65, that where a son and heir joins in a *grant* in the lifetime of his father, while he has neither possession nor right in the matter granted, the grant is utterly void, and nothing passes. So here, if the release pass nothing but what the releasor lawfully had, and he had no legal title in the premises at the time of the release made, those who claim under him by a subsequent good title are at liberty to show this; and there is no implied estoppel, as appears from the authorities just cited, and the Year Books 49 Ed. 3, 14, 15; 45 Ass. 5; 46 Ass. 6; and Brook's construction of these books in his Abr. tit. Estoppel, pl. 146; 10 Vin. Abr., Estoppel (M).

The case was put in argument on another ground for the lessors of the plaintiff, namely, that it was within the common rule that a mortgagor cannot dispute the title of his mortgagee. Such a rule without reference to the technical doctrine of estoppel, undoubtedly is to be met with as laid down by Lord Holt, in *Salkeld*, and has been often recognized in modern times. But we are of opinion that it does not apply to the present case. Here, the defendant Bucknell claims, as a purchaser for a valuable consideration without notice, a legal interest which was not in T. Jarvis at the time of his mortgage to the lessors of the plaintiff, and T. Jarvis had then an equitable interest which passed to them, and which is not questioned, nor sought to be disturbed by the defence which Bucknell sets up. This case much resembles that of *Goodtitle v. Morgan*, where a second mortgagee without notice, who got in the legal title, by taking an assignment, from a trustee and the mortgagor, of an outstanding term assigned to attend the inheritance, was holden entitled to a legal preference against the first mortgagee.

¹ This citation is erroneous. The opinion of the Lord Chancellor is found in 8 L. J. Ch. 85.

There, as here, it might be said that the conclusion as the mortgagor, and should be as the prior mortgagee. But the legal title prevails, and it ought here. The consequence upon entering a nonsuit must be absolute.

HOYT v. DIMOCK

5 Day (Conn.) 479.

MOTION for a new trial.

This was an action of *disseisin*, for a new trial. The defendant pleaded the general issue.

On the trial, the plaintiff claimed title by virtue of the levy of an execution in his favor against Austin Nichols; which levy was made on the 17th of September, 1797.

The defendant claimed title, by force of a deed from Austin Nichols to one Philo Norton, dated the 17th of September, 1797. This deed was given to secure the payment of notes, of fifteen hundred dollars each, one payable in one year after the date and execution, and the others in a regular series of conveyances, through said defendant to the defendant.

It also appeared, that one Daniel Nichols, the plaintiff, had possession of the premises, until the 25th of September, 1797, and that, retaining the usual covenants of seisin and warranty, he conveyed the same to Austin Nichols; and that, on 8th of September, 1797, Austin Nichols, by an absolute deed, conveyed the premises to the defendant.

It was contended in behalf of the plaintiff, that the deed from Austin Nichols, given for the purpose of enabling him to pay his creditors; and were, therefore, void, by the operation of the statute against fraudulent conveyances.

The plaintiff, also, contended, that if the defendant was prohibited on the trial, in relation to the execution of the deed, it was insufficient to shew, that the mortgage deed was sufficient to prove, that the subsequent deed destroyed the defendant's title. He, therefore, contended, that the absolute deed was executed and delivered to the defendant.

¹ Later English cases are *Sturgeon v. Wingfield*, 10 C. B. 400; *Finance Co. v. Liberator Building Society*, 10 C. B. 400; [1915] 1 K. B. 400.

See *Van Rensselaer v. Kearney*, 11 How. (U. S.) 228; *Pendill v. Society*, 95 Mich. 491; *Weaver v. Drake*, 79 Okla. 277; *Flanary v. Bullen*, 159 N. C. 291.

vested in the mortgagee, at law, the mortgage title was superseded; and that the defendant held possession, by virtue of the absolute deed only.

It was also contended, that nothing passed to Norton, by the mortgage deed of Austin Nichols, he having no interest in the land, at the time of the execution and delivery of the deed; his right having been acquired subsequently, by the deed of Daniel Nichols.

The court, in their charge, instructed the jury, that the only material fact for them to find, was, whether the mortgage deed from Austin Nichols to Norton, was fraudulent; if so, that they must find their verdict for the plaintiff; if otherwise, that they must find for the defendant. The jury returned their verdict for the defendant: And the plaintiff moved for a new trial, on the ground of a misdirection; which motion was reserved for the opinion of the nine judges.

BALDWIN, J. From the statement of this case, it is apparent, that the right of the plaintiff to recover, depends on his shewing, that no title was derived to the defendant, by either of the deeds. If either conveyed a valid title, the defendant was entitled to a verdict.

As the jury found the mortgage deed not to be fraudulent, and thereupon, gave their verdict for the defendant, the plaintiff cannot claim a new trial, on the ground, that the last deed was not submitted to their consideration; nor on the ground, that the direction given them was incorrect, unless, the law be so, that the mortgage deed, though not fraudulent, was of no effect for want of title in the grantor, at the time of its execution, and could not be made valid by subsequent title; or that the mortgage title was destroyed, by the subsequent absolute deed. The court, when they charged the jury, must have considered the mortgage as legal and valid, unless made void, by the statute against fraudulent conveyances; which, as a question of fact, they submitted, with the evidence, to the jury. I am of the same opinion.

It has been decided, in Connecticut, in conformity, I conceive, to the principles of the common law, that a grantor, with warranty, but without title, is estopped from denying his former title, or claiming under a subsequent one; and such covenants running with the land, this estoppel will affect and bind all those who claim under the grantor; of course, in this case, Austin Nichols, and the plaintiff, who claims under him, are estopped from setting up the subsequent title derived from Daniel Nichols, to defeat the mortgage deed. *Town of Norwich v. Congden*, 1 Root's Rep. 222; Co. Litt. 265; *Trevivan v. Lawrence*, 6 Mod. 258; s. c. Salk. Rep. 276; *Palmer v. Ekins*, 2 Ld. Raym. Rep. 1551. The subsequent title will thus inure to the benefit of the first grantee. The mortgage, then, is valid, unless defeated by the absolute deed from Austin Nichols to Philo Norton, the mortgagee. This, it is claimed, absorbed the mortgage though void as to creditors, it being good between the parties. [The court held that

the mortgage title was not destroyed by th

All the other Judges concurred in this
Ingersoll, Ja., who did not judge.

Net

BAXTER v. BRAI

20 Maine 260. 18

COVENANT broken, for breach of the cov
 warranty from the defendant to the plain
 In this deed many lots of land were conve
 were described. To prove the breach of th

¹ The doctrine is established by numerous
 that if A., having no title or an imperfect title
 of general warranty, and A. thereafter acquires
 after-acquired title will inure to the benefit of
 in B. forthwith without a second conveyance by
 given to other covenants. Thus to a covenant
v. Blaisdell, 5 N. H. 533. But the after-acqu
 source covered by the covenant. *Bennett v. I*
Heffernan, 143 Mass. 232; *Bell v. Twilight*, 2
Trull v. Eastman, 3 Met. (Mass.) 121; *Garlu*
 67 Ohio St. 223. *Contra, Pike v. Galvin*, 29 A
Bradford, 4 Wend. (N. Y.) 619. Of further a
 23 Ill. 97, 183. But see *Hope v. Stone*, 10 Mi
Foss v. Strachn, 42 N. H. 40. But compare *Doar*
 328. Of quiet enjoyment. *Tully v. Taylor*, 84

It is frequently said that this effect is given
 avoid circuitry of action, but such effect has
 suit could be brought against the grantor on th
 veyance with covenants by a married woman.
Contra, Jackson v. Vanderheyden, 17 Johns. (N.
 covenants in a conveyance by a State, see *Com*
 (Mass.) 224. And such effect has also been g
 grantor has been relieved from liability thereon
Bush v. Cooper, 18 How. (U. S.) 82; or by the
Raymond, 9 Gray (Mass.) 217. But see *Webber*
 127, 136-139. Compare *Goodel v. Bennett*, 22

When the grantor conveys "his right, title a
 deed meaning to pass only his present interest, th
 him from asserting any after-acquired title. *Vary*
v. Booth, 94 Ark. 306, *Little v. Eaton*, 267 Ill.
 Pick. (Mass.) 116; *Wight v. Shaw*, 5 Cush. (M.
 Cush. (Mass.) 34; *Ernst v. Ernst*, 178 Mich 100
 249. Compare *Pring v. Swarm*, 176 Iowa 153; C
 65, 67; *Robinson Co. v. Davis*, 187 Pac. (Wyo.
v. Keleher, 214 S. W. (Mo.) 961; *Blackwell v. I*
 35 L. R. A. N. S. 1182, note.

Sale or assignment of an expectancy by a pros
man, 3 Met. (Mass.) 121; 37 Am. Dec. 128 note
 S. C. 572; 25 L. R. A. N. S. 436 note; L. R. A.
Garrow v. Tozey, 188 Ala. 572.

plaintiff read a deed of warranty from John Peck to Benjamin Joy, conveying the town of Corinth, with certain reservations, dated July 27th, 1799. The land in controversy was part of the land conveyed to Joy. The plaintiff proved the consideration paid for these lots, and there rested his case.

The defendant then read a deed of mortgage, dated August 3d, 1835, from the plaintiff to him, of the same premises to secure the payment of certain notes; and a deed of quitclaim of the same premises from the plaintiff to Chester Baxter, dated July 31, 1837. To prove a seisin in the plaintiff, and also for the purpose of reducing the damages, the defendant offered in evidence a deed of quitclaim from Amos Whitney to him of one of the lots, dated August 24, 1835, and the warranty deed of Thomas Whitten, dated the same day, of another lot, and offered evidence to show that the grantors were then in possession. To the introduction of this evidence the plaintiff objected, and *Emery, J.*, presiding at the trial, ruled it to be inadmissible, and rejected it. The defendant also offered the contract of Joy, dated in June, 1835, to convey certain of the lands in controversy to the defendant, and a deed of the same from the heirs of Joy, dated Oct. 20, 1837, after this action was commenced, but the judge rejected it. The defendant then offered to prove that the lots were of less value than the purchase-money. This evidence was rejected.

A default was then entered by consent, and the damages assessed at the amount of the consideration and interest, under an agreement, that if in the opinion of the whole court, the evidence rejected should have been admitted, the default was to be taken off, and the action stand for trial.

The opinion of the court was by

WILSON, C. J. It is assumed in argument that Amos Whitney and Thomas Whitten were seised of the lands described in their respective deeds to the defendant, dated August 24, 1835. The lands constitute a part of that, which is the subject-matter of this suit. These deeds, with the evidence of their seisin, were rejected as inadmissible, by the presiding judge at the trial. If this evidence could legally have any effect upon the right of the plaintiff to recover, or upon the measure of damages, it ought not to have been rejected.

The rules, which have been established to determine the measure of damages, upon the breach of covenants in deeds for the conveyance of real estate, have been framed with a view to give the party entitled a fair indemnity for damage he has sustained. Thus if the covenant of seisin is broken, as thereby the title wholly fails, the law restores to the purchaser, the consideration paid, which is the agreed value of the land, with interest. But in this, as well as in other covenants, usual in the conveyance of real estate, if there exists facts and circumstances, which would render the application of the rule inequitable, they are to be taken into consideration by a jury. *Leland v. Stone*, 10 Mass. R. 459. The covenant was intended to secure to the plaintiff a legal

seisin in the land conveyed. If he has a right to reclaim the land, another covenant in the same deed gives him the subject-matter of the covenant. It would be altogether inequitable to be allowed besides to recover back the rule as to the measure of damages, which is just in its general application to such a case. In *Whitney* strongly intimated by the court, it undoubtedly has.

If Whitney and Whitten were parties to the deed, which was the subject-matter of the plaintiff's declaration, which the plaintiff declares, then the plaintiff, in virtue of the covenant of warranty, *v. Skinner*, 3 Pick. 52. It has been held by the plaintiff that this effect depends upon the fact that the plaintiff here would reject the deed, as we are aware of no legal principle which would prevent it. In the case last cited, the court has deduced from all the authorities that a deed creates an estoppel to a party who has nothing in the estate at the time of making a title afterwards by descent or purchase. The plaintiff by taking a general warranty, assented to, but secured and made himself liable to the consequences, resulting from that deed, before the commencement of the action, which it was the object of both parties to obtain, entitled only to nominal damages. The plaintiff's objection was legally admissible. The damages may be given in evidence, without proof of the deed. 17 Mass. R. 365. Whether the deed is defeasible or indefeasible, is not a question in this case. The covenant, which operates only to assure the paramount title.

The same course of reasoning which has justified the admission of the testimony in evidence of title derived by estate, has been received.

It has been objected, that the plaintiff's title, which may have prevented a recovery in fee, upon the decease of the plaintiff, in pursuance of the laws of inheritance, have been intercepted by a devise to the defendant, the plaintiff's

an indefeasible title. As, however, that was executed, since the commencement of the action, the plaintiff is entitled to nominal damages, and to nothing more, if he has not been disturbed in his possession; and judgment may be rendered for him therefor on the default, which has been entered. But if the actual seisin of Whitney and Whitten is intended to be contested, or the plaintiff would show that he had been dispossessed, before his title by estoppel attached, the default must be taken off, and the action stand for trial.¹

BLANCHARD v. ELLIS AND ANOTHER

1 Gray (Mass.) 195. 1854.

ACTION of contract on the covenant against encumbrances, contained in a deed from the defendants to the plaintiff, dated the 9th of November, 1838, purporting to be made in consideration of the sum of \$5,520, and to convey "one undivided quarter part of the east half of township numbered three in the eighth range of townships in the County of Penobscot and State of Maine," with the usual covenants of warranty. The declaration set forth the execution and delivery of the deed; and then alleged that, at the date of the execution thereof, the land therein described was not free from encumbrances, but was under an attachment, made on the 18th of February, 1836, in an action brought by Wiggins Hill against James T. Hobart, then owner of the premises, and from whom the defendants derived their title; that in said action Hill, on the 6th of November, 1838, recovered judgment for the sum of \$52,755.39; and on said judgment execution issued, and was duly levied upon said land on the 25th of December, 1838; and seisin and possession of said land was delivered to Hill, the judgment creditor, and received by him. Writ dated October 18th, 1851.

At the trial before *Bigelow, J.*, there was evidence tending to prove the facts stated in the declaration, and also the following facts: The amount of the execution was much greater than the value of the land levied upon, which was the whole of the east half of the township, of which the land conveyed to the plaintiff constituted an undivided quarter part; and by virtue of the levy the title to the east half of said township became absolutely vested in Hill in one year from the date of the levy; and he continued in possession of the land levied upon until the 4th of December, 1848, when he made a deed to the defendants of the portion included in their deed to the plaintiff, expressed to be in consideration of \$1,100, and with the usual covenants of warranty. In February, 1841, the defendants gave notice to the plaintiff of this failure of title, and

¹ See *McLennan v. Prentice*, 85 Wis. 427, 433.

offered to transfer to him certain stock loss. During the time that Hill remained in the township, he received the sum of four hundred dollars. The plaintiff offered no evidence to show that the premises were of more value at the date of the deed from the defendant than at the date of the deed from the defendant, or that anything had been realized or received therefrom.

The case was taken from the jury by the court, and reserved for the consideration of the full court. The court held that if the court should be of opinion, that the plaintiff was entitled to recover no more than the sum of one hundred dollars, judgment should be rendered in his favor for that sum; and if the court should be of opinion that the plaintiff was entitled to recover more than the sum of one hundred dollars, judgment should be rendered in his favor for the sum received by Hill; and that if the court should be of opinion that the plaintiff was entitled to recover any other sum, the case should be sent to a jury for trial and judgment on principles to be determined by the court.

THOMAS, J. It is not doubted that there was a breach of the defendants' covenant; but the measure of damages between the parties is as to the measure of the value of the premises at the time of the conveyance.

The defendants say, that a deed of the premises to them by Hill, on the 4th of December, 1854, was inured to them by way of estoppel, to the benefit of them, and that the only damages he can recover are the value of the premises at the time of the conveyance, or the difference, if any, between the value of the premises at the time of the conveyance and the value of the premises at the time of the conveyance.

The general doctrine, on which the defendants rely, is familiar; that if A., having no title, makes a deed of the premises, and A. subsequently purchases the premises, he is estopped by his deed to deny that he had a good title at the time of the conveyance, and such new title is said to inure to his benefit. There would seem to be no transmutation of title, if A. comes to the grantor. Nor is there any objection to the conveyance, if A. convey a title not then existing in the grantor, but his then existing title. But the grantor and his heirs are estopped to deny the value of the premises, if the grantor has solemnly asserted, and to set up a new title, he presumes that he has spoken and acted as of right, and will not permit him or those claiming under him to deny the value of the premises. "The reasons," says Mr. Butler, in *Butler v. Butler*, "why estoppels are allowed, seem to be to prevent a party from alleging anything but the truth for his defense."

once is to be presumed true, and therefore he ought not to contradict it; for, as it is said in the 4 Inst. 272, *allegans contraria non est audiendus*." It might be curious to trace the progress of this doctrine of estoppel, as applicable to the covenant of warranty, from the simple rebutter of Lord Coke (Co. Lit. 265 a), which should bar a future right, to avoid a circuitry of action, to its present condition, in which there is claimed for it the full force of a feoffment, or fine or common recovery at the common law; that is, having the function of actually divesting the feoffor or conusor of any estate which he might thereafter acquire. But waiving, because not necessary to our purpose, the discussion of the origin and extent of the doctrine of estoppel, it will be sufficient to say that we do not feel called upon to extend its application; especially when such extension would tend to defeat the principle on which the doctrine of estoppel rests, which is the prevention of wrong and injustice.

Supposing it to be well settled that, if a new title come to the grantor before the eviction of his grantee, it would inure to the grantee, and not deciding, because the case does not require it, whether the grantee, even after eviction, might elect to take such new title, and the grantor be estopped to deny it; we place the decision of this case on this precise ground, that where a deed of land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against encumbrances, or in mitigation of damages for the breach of it.

We do not seek a better illustration of the soundness of this principle than is furnished by the facts of this case. The land, for which the consideration stated in the deed was \$5,520, was under attachment in a suit in which judgment had been recovered for more than fifty thousand dollars; the entire tract, of which one quarter had been conveyed to the plaintiff, was afterwards levied upon, seisin given to the creditor, and the plaintiff wholly evicted. He had no estate or interest left. The covenant against encumbrances being personal, and not running with the land, he had nothing which could pass by deed. He could not redeem his undivided quarter, without a redemption of the entire estate. He could not, for a period of ten years, enter upon the land, without committing a trespass. The defendants admit the existence of the title paramount, and the eviction of the plaintiff; but contend, after the eviction has continued ten years that they, as grantors, may avail themselves of this rule of estoppel, to force the grantee to take the estate, however changed the situation of his own affairs, or the condition of the land. So that the equitable rule of estoppel, which forbids the grantor to deny that he had the estate which he had assumed to grant, and the truth of his own covenant — a rule established for the protection of the grantee, and

the covenant of warranty, in which there was a judgment for the defendant. 9 Met. 150. The defendant had conveyed land to the plaintiff, bounded on land of Tuckerman; a conventional line had been fixed by parol agreement between the defendant and Tuckerman; and they had occupied according to that conventional line; but the court, in the action on the covenant of warranty, held that the true line, and not the conventional line, was the boundary referred to in the defendant's deed. An action was then brought on the covenant of seisin; and the possession of land by Tuckerman, between the true line and the conventional line, being under a claim of title, was held to be a breach of the covenant of seisin. In the assessment of damages, it appeared that a portion of the land had been recovered by the defendant of the heirs of Tuckerman; and the report of the assessor submitted the question, whether the value of the land so recovered should be included in his assessment. The court said: "If, by any means, the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages *pro tanto*." In that case the title was in the grantor at the time of the deed, and he might have made a valid conveyance but for the disseisin; and what the court decided was, that if he subsequently regained the seisin, and the land was restored to the grantee, it would proportionally reduce his damages.

Upon examination of the authorities, we think no decision will be found to be in conflict with the point now decided, or which leads to the result claimed by the defence. There are *dicta* which, taken out from their connection with the facts, in relation to which they are made, and by which their soundness must always be tested, might tend to a different conclusion; but no precedent has so extended the doctrine of estoppel, and we do not feel willing to make one.

The question of course arises, How will the defendants, the grantors, be protected? Will they not be still estopped to deny the title of the plaintiff, if he should bring his writ of entry for the land? The answer is, that the judgment in this suit will be a perfect bar to the plaintiff and those claiming under him. *Porter v. Hill*, 9 Mass. 34.

With regard to the rule of damages, there can be no serious controversy, if the plaintiff has gained no title by estoppel; the plaintiff will be entitled to the consideration money and interest. The consideration expressed in the deed is *prima facie* the true one, but liable to be controverted by evidence.

The case must be sent to a jury to ascertain the damages under this rule.¹

¹ *Southern Plantations Co. v. Kennedy Heading Co.*, 104 Miss. 131; *Jones v. Gallagher*, 54 Okla. 611, *accord*.

In *Resser v. Carney*, 52 Minn. 397, A., having no title, purported to convey land to B., with covenants of seisin and warranty. B. brought suit on

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WHITE v. PATTEN

24 Pick. (Mass.) 324. 1837.

WRIT of entry to recover a messuage in Brookline.

On a case stated, it appears, that both parties claim under Isaac Thayer.

The demandant derives his title from a mortgage made to him by Thayer, dated the 30th of December, 1833, and recorded on the 19th of February, 1834, containing the usual covenants of seisin, warranty, &c.

At the time of the execution of the mortgage to the demandant, the legal title was in John Perry, the father-in-law of Thayer. Perry conveyed to Thayer in fee simple, by deed dated the 20th of July, 1834, and delivered on the 2d of August, in the forenoon.

The tenant derives his title from a mortgage made to him by Thayer, dated the 21st of July, 1834, and delivered on the 2d of August, 1834, in the afternoon, containing the usual covenants of seisin, warranty, &c. This mortgage, and the deed from Perry to Thayer, were left for registry at the same time, in the afternoon of the 2d of August.

Thayer was in possession at the time of making the mortgage to the demandant, and continued in possession until the 13th of Febru-

acquired title is in terms conveyed, is inconsistent with the idea of an estoppel binding the latter and those in privity with him; and yet it is not to be doubted that the doctrine which we are considering really rests upon the ground of estoppel. It is founded on equitable principles, and affords to a grantee with covenants a remedy of an equitable nature with respect to a title acquired by the grantor after he had assumed to convey the same; and doubtless courts of law, at this day, recognize and apply the principle of estoppel, in such cases, as courts of equity are wont to do. They will treat the after-acquired title as though it had been conveyed, when equity would decree that a conveyance be made. Rawle, Cov. § 258. But this equitable right is one in favor of the *covenantee*, resting upon the estoppel of the covenantor to assert, as against him, a title to the property. If the grantee acquires nothing by the deed to him, and has and asserts a legal cause of action for covenant broken, no principle of estoppel operates against *him*, to compel him, perhaps years afterwards, as in this case, to accept, in satisfaction of that legal cause of action, wholly or partially, a title which his covenantor may then procure. The latter, whose covenant has been wholly broken, has no right to elect, as against the covenantee, and to his prejudice, whether he will respond in damages for the breach by repaying the purchase money, or buy in the paramount title, when the value of the property may have greatly depreciated, and compel the plaintiff to accept that title. The right of election is, and should be, with the other party. He has the *benefit* of the estoppel, but it is not to be imposed upon him as a *burden*, at the will of the party who alone is subject to the estoppel. He may elect to pursue the action at law, and recover the consideration paid for a title which was not conveyed to him. At least, he may so elect, as the plaintiffs did in this case, at any time before the acquisition of the title by the covenantor."

and that the tenant, claiming subsequently under Weston, was privy in estate and bound by the estoppel.

The case of *Weale v. Lower*, Pollexfen, 60, is to the same point. Where one conveyed by a fine an estate which at the time was contingent, yet the party conveying was bound by estoppel, and when the contingency happened, that "which at the beginning was only good against him by estoppel would then have been turned into a good estate and term in interest." And p. 66, *per* Lord Chief Justice Hale: "The estate which cometh to the heir upon the happening of the contingency, feeds his estoppel, and the estate by estoppel becometh an estate in interest, and shall be of the same effect as if the contingency had happened before the fine levied."

So in the case at bar, Thayer and his heirs and assigns are bound by his deed with warranty to White. The tenant claims the same estate as the assignee or grantee of Thayer by a subsequent conveyance, and the tenant is concluded, as his grantor was concluded, to aver that Thayer had no title when he conveyed to White. The tenant is privy in estate.

Co. Lit. 352 a. Privies in blood, as the heir, privies in estate, as the feoffee, lessee, &c., privies in law, comprehending those who come in by act in law or in the *post*, shall be bound and take advantage of estoppels.

Termes de la Ley, *Privy*. "The lessees or feoffees are called privies in estate, and so are their heirs."

The conveyance of the title by the deed of Perry to Thayer, after his deed to White, turned the estoppel which bound Thayer and his heirs and assigns, into a good estate in interest. So that by the operation of law the interest should be considered as vested in him in the same manner as if it had been conveyed to Thayer before he conveyed to White. And if that had been the case there could be no question between these parties now before the court. For White procured his deed from Thayer to be recorded before the tenant obtained his deed from Thayer.

It would be very easy to multiply authorities in support of the principle upon which this case is decided, but it is not necessary. The court are of opinion, for the reasons and upon the authorities before referred to, and cited by the counsel for the demandant, that he is entitled to recover.¹

¹ *Tefft v. Munson*, 57 N. Y. 97; *McCusker v. McEvey*, 9 R. I. 528, 10 R. I. 606; *Jarvis v. Aikens*, 25 Vt. 635, *accord*. See *Hodges v. Goodspeed*, 20 R. I. 537.

Contra, *Wheeler v. Young*, 76 Conn. 44; *Calder v. Chapman*, 52 Pa. 359; *Breen v. Morehead*, 104 Tex. 254. See *Way v. Arnold*, 18 Ga. 181; *Morrison v. Caldwell*, 5 T. B. Mon. (Ky.) 426, 433-434; *Ford v. Unity Society*, 120 Mo. 498; *Richardson v. Lumber Co.*, 93 S. C. 254.

Compare *Balch v. Arnold*, 9 Wyo. 17, 37-39 (under system of recording in western states).

In the following cases the grantee under a deed by a grantor having no

repurchased the land, the mortgagor went into bankruptcy and got his discharge. The judge below ruled that the discharge was immaterial, and for that reason alone declined to reopen the agreed statement, and the case comes before us upon an exception to that ruling.

The tenant's counsel frankly avow their own opinion that the discharge in bankruptcy makes no difference. But they say that the inuring of an after acquired title by virtue of a covenant of warranty must be due either to a representation or to a promise contained in the covenant, and that if it is due to the former, which they deem the correct doctrine, then they are entitled to judgment on the agreed statement of facts as it stands, on the ground that there can be no estoppel by an instrument when the truth appears on the face of it, and that in this case the deed showed that the grantor was conveying land subject to a mortgage. If, however, contrary to their opinion, the title inures by reason of the promise in the covenant, or to prevent circuitry of action, then they say the provision is discharged by the discharge in bankruptcy.

However anomalous what we have called the American doctrine may be, as argued by Mr. Rawle and others (Rawle on Covenants, 5th ed., §§ 247 *et seq.*), it is settled in this State as well as elsewhere. It is settled also that a discharge in bankruptcy has no effect on this operation of the covenant of warranty in an ordinary deed where the warranty is coextensive with the grant. *Bush v. Cooper*, 18 How. 82; *Russ v. Alpaugh*, 118 Mass. 369, 376; *Gibbs v. Thayer*, 6 Cush. 30; *Cole v. Raymond*, 9 Gray 217; Rawle on Covenants, (5th ed.,) § 251. It would be to introduce further technicality into an artificial doctrine if a different rule should be applied where the conveyance is of land subject to a mortgage against which the grantor covenants to warrant and defend. No reason has been offered for such a distinction, nor do we perceive any.

But it is said that the operation of the covenant must be rested on some general principle, and cannot be left to stand simply as an unjustified peculiarity of a particular transaction without analogies elsewhere in the law, and that this general principle can be found only in the doctrine of estoppel by representation, if it is held, as the cases cited and many others show, that the estoppel does not depend on personal liability for damages. Rawle on Covenants, (5th ed.,) § 251.

If the American rule is an anomaly, it gains no strength by being referred to a principle which does not justify it in fact and by sound reasoning. The title may be said to inure by way of estoppel when explaining the reason why a discharge in bankruptcy does not affect this operation of the warranty; but if so, the existence of the estoppel does not rest on the prevention of fraud or on the fact of a representation actually believed to be true. It is a technical effect of a technical representation, the extent of which is determined by the

scope of the words devoted to making it. A subsequent title would inure to the grantee when the grant was of an unencumbered fee although the parties agreed by parol that there was a mortgage outstanding; (*Chamberlain v. Meeder*, 16 N. H. 381, 384; see *Jenkins v. Collard*, 145 U. S. 546, 560;) and this shows that the estoppel is determined by the scope of the conventional assertion, not by any question of fraud or of actual belief. But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description. But this is not necessarily so; and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unencumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact. The warranty is intended to fix the extent of responsibility assumed, and by that the grantor makes himself answerable for the fact being true. In short, if a man by a deed says, I hereby estop myself to deny a fact, it does not matter that he recites as a preliminary that the fact is not true. The difference between a warranty and an ordinary statement in a deed is, that the operation and effect of the latter depends on the whole context of the deed, whereas the warranty is put in for the express purpose of estopping the grantor to the extent of its words. The reason "why the estoppel should operate, is, that such was the obvious intention of the parties." *Blake v. Tucker*, 12 Vt. 39, 45.

If a general covenant of warranty following a conveyance of only the grantor's right, title, and interest were made in such a form that it was construed as more extensive than the conveyance, there would be an estoppel coextensive with the covenant. See *Blanchard v. Brooks*, 12 Pick. 47, 66, 67; *Bigelow, Estoppel*, (5th ed.) 403. So in the case of a deed by an heir presumptive of his expectancy with a covenant of warranty. In this case, of course, there is no pretence that the grantor has a title coextensive with his warranty. *Trull v. Eastman*, 3 Met. 121, 124. In *Lincoln v. Emerson*, 108 Mass. 87, a first mortgage was mentioned in the covenant against encumbrances in a second mortgage but was not excepted from the covenant of warranty. The title of the mortgagor under a foreclosure of the first mortgage was held to inure to an assignee of the second mortgage. Here the deed disclosed the truth, and for the purposes of the tenant's argument it cannot matter what part of the deed discloses the truth, unless it should be suggested that a covenant of warranty cannot be made more extensive than the grant, which was held not to be the law in our former decision. See also *Calvert v. Sebright*, 15 Beav. 156, 160.¹

The question remains whether the tenant stands better as a purchaser without actual notice, assuming that he had not actual notice of the second mortgage.

¹ See *Drury v. Holden*, 121 Ill. 130; *McAdams v. Bailey*, 169 Ind. 518; *Koch v. Hustis*, 113 Wis. 604.

"It has been the settled law of this Commonwealth for nearly forty years, that, under a deed with covenants of warranty from one capable of executing it, a title afterwards acquired by the grantor inures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding by descent or grant from him after acquiring the new title. *Somes v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 324; *Russ v. Alpaugh*, 118 Mass. 369, 376. We are aware that this rule, especially as applied to subsequent grantees, while followed in some States, has been criticised in others. See Rawle on Covenants, (4th ed.) 427 *et seq.* But it has been too long established and acted on in Massachusetts to be changed, except by legislation." *Knight v. Thayer*, 125 Mass. 25, 27. See *Powers v. Patten*, 71 Maine, 583, 587, 589; *McCusker v. McEvey*, 9 R. I. 528; *Tefft v. Munson*, 57 N. Y. 97.¹

It is urged for the tenant that this rule should not be extended. But if it is a bad rule, that is no reason for making a bad exception to it. As the title would have inured as against a subsequent purchaser from the mortgagor had his deed made no mention of the mortgage, and as by our decision his covenant of warranty operates by way of estoppel notwithstanding the mention of the mortgage, no intelligible reason can be stated why the estoppel should bind a purchaser without actual notice in the former case, and not bind him in the latter.

Upon the whole case, we are of opinion that the demandant is entitled to judgment. Our conclusion is in accord with the decision in a very similar case in Minnesota. *Sandwich Manuf. Co. v. Zellmer*, 48 Minn. 408. *Exceptions overruled.*²

PERKINS v. COLEMAN

90 Ky. 611. 1890.

JUDGE BENNETT delivered the opinion of the court.

N. G. Terry owned an undivided interest in the land in controversy, and conveyed the whole of it to Horace Dunham by deed of general warranty. Thereafter Terry inherited that part of the land.

¹ In *Philly v. Sanders*, 11 Ohio St. 490, 496, the court said: "The force and effect of the estoppel is, in law, just as binding upon a subsequent grantee as it is upon the grantor; and upon either it is equally obligatory with the language of the deed creating the first grant, or conveyance. An obligation of estoppel binds not only the grantor in such a case, but his heirs and subsequent grantees, and all persons privy to him. It adheres to the land, and is transmitted with the estate, whether the same passes by descent or purchase. And the estoppel becomes, and forever after remains, a muniment of the title so acquired; and when the party so estopped conveys the land, he necessarily conveys it subject to such estoppel in the hands of his grantee." See also *Doe d. Potts v. Dowdall*, 3 Houst (Del.) 369.

² See *Dye v. Thompson*, 126 Mich. 597; *Rooney v. Koenig*, 80 Minn. 483.

that he did not own, and this action of ejectment is brought by Terry's heirs to recover the possession of that part of the land thus inherited from the appellee. He resists the right of the appellants to recover the said land upon the ground that the title that Terry inherited was transferred to his vendee by estoppel. The appellants contend that the doctrine of estoppel does not protect strangers to the transaction; but only the parties and privies are bound thereby; and as the appellee is neither party nor privy, he cannot avail himself of the estoppel that would bar the appellants' rights as against Dunham or his privies.

It is true that where the estoppel merely affects the consciences of the parties, and not the title, it does not operate on strangers to the transaction; but where it "works an interest in the land" conveyed, "it runs with it, and is a title." Where it clearly appears from the writing that the vendor has conveyed, or agrees to convey, a good and sufficient title, and not merely his present interest in the land, the agreement runs with the land, and repeats itself every day; and if the vendor, at the time of the conveyance, has not title to the land, but subsequently acquires the title, it, "*eo instante*," inures to the benefit of the vendee and his privies. In other words, it is immediately transferred by the law of estoppel to the vendee and his privies, because by the contract, which daily repeats itself, the vendor's title, whenever acquired, is transferred to the vendee and his privies; consequently, a stranger to the transaction, in an action of ejectment by the vendor against him, where he must recover upon the strength of his title, and not upon the weakness of his adversary, may show that he has thus parted with his title.

*The judgment is affirmed.*¹

¹ In *Somes v. Skinner*, 3 Pick. (Mass.) 52, A owned a parcel of land. His son B purported to mortgage this to X by deed with covenant of warranty. A died and the land came by descent to B and C his brother. C was in possession. X brought a writ of entry, and it was *held*, that he was entitled to recover a moiety of the land. The court said that the after-acquired title passed to the grantee as against the grantor, and those claiming under the grantor, "and against mere strangers who usurped the possession without right or title."

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CHAPTER XIII

DEDICATION

CINCINNATI *v.* WHITE

6 Pet. (U. S.) 431. 1832

THIS was a writ of error to the Circuit Court of the District of Ohio.

The case came before the court on a bill of exceptions, taken by the plaintiffs in error, the defendants in the Circuit Court, to the instructions given by the court to the jury on the request of the counsel for the plaintiffs in that court; and to the refusal of the court to give certain instructions as prayed for by the defendants below.

In the opinion of the court no decision is given on those exceptions, save only on that which presented the question of the dedication of the land in controversy for the use of the city of Cincinnati; which, and the facts of the case connected therewith, are fully stated in the opinion of the court. The arguments of the counsel in the case, on the matters of law presented by the exceptions, are therefore necessarily omitted.

MR. JUSTICE THOMPSON delivered the opinion of the court.

The ejectment in this case was brought by Edward White, who is also the defendant in error, to recover possession of a small lot of ground in the city of Cincinnati, lying in that part of the city usually denominated the Common. To a right understanding of the question upon which the opinion of the court rests, it will be sufficient to state generally, that on the 15th of October in the year 1788, John Cleves Symmes entered into a contract with the then board of treasury, under the direction of Congress, for the purchase of a large tract of land, then a wilderness, including that where the city of Cincinnati now stands. Some negotiations relative to the payments for the land delayed the consummation of the contract for several years. But on the 30th of September, 1794, a patent was issued conveying to Symmes and his associates, the land contracted for; and as Symmes was the only person named in the patent, the fee was of course vested in him.

Before the issuing of the patent, however, and, as the witnesses say, in the year 1788, Mathias Denman purchased of Symmes a part of the tract included in the patent, and embracing the land whereon Cincinnati now stands. That in the same year, Denman sold one third of his purchase to Israel Ludlow, and one third to Robert Patterson. These three persons, Denman, Ludlow and Patterson, being

the equitable owners of the land (no legal title having been granted), proceeded in January, 1789, to lay out the town. A plan was made and approved of by all the proprietors; and according to which the ground lying between Front Street and the river, and so located as to include the premises in question, was set apart as a common, for the use and benefit of the town forever, reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common.

The lessor of the plaintiff made title to the premises in question under Mathias Denman, and produced in evidence a copy, duly authenticated, of the location of the fraction 17 from the books of John C. Symmes to Mathias Denman, as follows: "1791, April 4, Captain Israel Ludlow, in behalf of Mr. Mathias Denman of New Jersey, presents for entry and location a warrant for one fraction of a section, or one hundred and seven acres and eight tenths of an acre of land, by virtue of which he locates the seventeenth fractional section in the fourth fractional township, east of the Great Miami river, in the first fractional range of townships on the Ohio river; number of the warrant 192." In March, 1795, Denman conveyed his interest, which was only an equitable interest, in the lands so located to Joel Williams; and on the 14th of February, 1800, John Cleves Symmes conveyed to Joel Williams in fee, certain lands described in the deed which included the premises in question; and on the 16th of April, 1800, Joel Williams conveyed to John Daily the lot now in question. And the lessor of the plaintiff, by sundry mesne conveyances, deduces a title to the premises to himself.

In the course of the trial several exceptions were taken to the ruling of the court, with respect to the evidence offered on the part of the plaintiff in making out his claim of title. But in the view which the court has taken of what may be considered the substantial merits of the case, it becomes unnecessary to notice those exceptions.

The merits of the case will properly arise upon one of the instructions given by the court, as asked by the plaintiff; and in refusing to give one of the instructions asked on the part of the defendant. At the request of the plaintiff, the court instructed the jury, "that to enable the city to hold this ground and defend themselves in this action by possession, they must show an unequivocal, uninterrupted possession for at least twenty years."

On the part of the defendants, the court was asked to instruct the jury, "that it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the whole estate of the said proprietors in said land, thus reserved and dedicated, became the property of, and was vested in the public, for the purposes intended by the said proprietors; and that, by such dedication and reservation, the said original proprietors, and all persons claiming under them, are estopped from asserting any claim or right

to the said land thus reserved and dedicated." The court refused to give the instruction as asked, but gave the following instruction:

"That it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the right of *use* to such part, is vested in the public for the purposes designated; but that such reservation and dedication do not invest the public with the fee."

The ruling of the court to be collected from these instructions was, that although there might be a parol reservation and dedication to the public of the *use* of lands; yet such reservation and dedication did not invest the public with the fee; and that a possession and enjoyment of the use for less than twenty years, was not a defence in this action.

The decision and direction of the Circuit Court upon those points, come up on a writ of error to this court.

It is proper in the first place to observe, that although the land which is in dispute, and a part of which is the lot now in question, has been spoken of by the witnesses as having been set apart by the proprietors as a common, we are not to understand the term as used by them in its strict legal sense; as being a right or profit which one man may have in the lands of another; but in its popular sense, as a piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants of the town.

Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor; and secure to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication.

It was admitted at the bar, that dedications of land for charitable and religious purposes, and for public highways, were valid, without any grantee to whom the fee could be conveyed. Although such are the cases which most frequently occur and are to be found in the books, it is not perceived how any well grounded distinction can be made between such cases and the present. The same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public use, where there is no grantee *in esse* to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case. In this class of cases there may be instances, contrary to the general rule, where the fee may remain in

It shows, in the first place, that no deed or writing was necessary to constitute a valid dedication of the easement. All that was done, from anything that appears in the case, was barely laying out the street by the owner, across his land. And in the second place, that it is not necessary that the fee of the land should pass, in order to secure the easement to the public. And this must necessarily be so from the nature of the case, in the dedication of all public highways. There is no grantee to take immediately, nor is any one contemplated by the party to take the fee at any future day. No grant or conveyance can be necessary to pass the fee out of the owner of the land, and let it remain in abeyance until a grantee shall come *in esse*; and indeed the case referred to in *Strange* considers the fee as remaining in the original owner; otherwise he could sustain no action for a private injury to the soil, he having transferred to the public the actual possession.

If this is the doctrine of the law applicable to highways, it must apply with equal force, and in all its parts, to all dedications of land to public uses; and it was so applied by this court to the reservation of a public spring of water for public use, in the case of *M'Connell v. The Trustees of the Town of Lexington*, 12 Wheat. 582. The court said; the reasonableness of reserving a public spring for public use, the concurrent opinion of all the settlers that it was so reserved, the universal admission of all that it was never understood that the spring lot was drawn by any person, and the early appropriation of it to public purposes; were decisive against the claim.

The right of the public to the use of the common in Cincinnati, must rest on the same principles as the right to the use of the streets; and no one will contend, that the original owners, after having laid out streets, and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public.

All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati; and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds.

And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

The right of the public in such cases does not depend upon a twenty years' possession. Such a doctrine, applied to public highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and private right.

The case of *Jarvis v. Dean*, 3 Bingham, 447, shows that rights of this description do not rest upon length of possession. The plaintiff's right to recover in that case, turned upon the question whether a certain street in the parish of Islington had been dedicated to the public as a common public highway. Chief Justice Best, upon the trial, told the jury that if they thought the street had been used for years as a public thoroughfare, with the assent of the owner of the soil, they might presume a dedication; and the jury found a verdict for the plaintiff, and the court refused to grant a new trial, but sanctioned the direction given to the jury and the verdict found thereupon; although this street had been used as a public road only four or five years; the court saying, the jury were warranted in presuming it was used with the full assent of the owner of the soil. The point therefore upon which the establishment of the public street rested, was whether it had been used by the public as such, *with the assent* of the owner of the soil; not whether such use had been for a length of time, which would give the right by force of the possession; nor whether a grant might be presumed; but whether it had been used with the assent of the owner of the land; necessarily implying, that the mere naked fee of the land remained in the owner of the soil, but that it became a public street, by his permission to have it used as such. Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

In the present case, the fact of dedication to public use, is not left to inference, from the circumstance that the land has been enjoyed as a common for many years. But the actual appropriation for that purpose is established by the most positive and conclusive evidence. And indeed the testimony is such as would have warranted the jury in presuming a grant, if that had been necessary. And the fee might be considered in abeyance, until a competent grantee appeared to receive it; which was as early as the year 1802, when the city was incorporated. And the common having then been taken under the charge and direction of the trustees, would be amply sufficient, to show an acceptance, if that was necessary, for securing the protection of the public right.

But it has been argued, that this appropriation was a nullity, because the proprietors, Denman, Ludlow and Patterson, when they laid out the town of Cincinnati, and appropriated this ground as a common, in the year 1789, had no title to the land, as the patent to Symmes was not issued until the year 1794. It is undoubtedly true that no legal title had passed from the United States to Symmes.

But the proprietors had purchased of Symmes all his equitable right to their part of the tract which he had under his contract with the government. This objection is more specious than solid, and does not draw after it the conclusions alleged at the bar.

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of *Jarvis and Dean*, already referred to, with respect to a street; and the same rule must apply to all public dedications; and from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed. In the present case, there having been an actual dedication fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of *Rex v. Lloyd*, 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to the public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the land but the mere naked fee. And the assent of the proprietors to the dedication continuing, it has the same effect and operation as if it had originally been made after the patent issued. It may be considered a subsequent ratification and affirmance of the first appropriation. And it is very satisfactorily proved, that Joel Williams, from whom the lessor of the plaintiff deduces his title, well understood, when he purchased of Denman, and for some years before, that this ground had been dedicated as a public common by the proprietors. The original plat, exhibiting this ground as a common, was delivered to him at the time of the purchase. And when he afterwards, in the year 1800, took a deed from Symmes, he must, according to the evidence in the case, have known, that he was a mere trustee, holding only the naked fee. And from the notoriety of the fact, that these grounds were laid open and used as a common: it is fairly to be presumed, that all subsequent purchasers had full knowledge of the fact.

But it is contended that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the Circuit Court, in the fourth instruction asked by

aware of its having been adopted in any other case where it was the direct point in judgment. No such case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the Supreme Court of Errors of Connecticut, where the contrary doctrine has been asserted and sustained by reasons much more satisfactory than those upon which the case in *Burrow* is made to rest. *Stiles v. Curtis*, 4 Day 328; *Peck v. Smith*, 1 Con. Rep. 103.

But if we look at the action of ejectment on principle, and inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff.

The purpose for which the action is brought, is not to try the mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right. That right consists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of his action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement, or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said, by Mr. Justice Smith in the case of *Stiles v. Curtis*, that the execution of a judgment in such case, involves as great an inconsistency as to issue an *habere facias possessionem* of certain premises to A., subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

It is said in the case in *Burrow*, that an ejectment could be maintained because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So, also, if the fee is supposed to remain in the original owner, cases may arise where perhaps waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with the public right. But a recovery in an action of ejectment, if carried into execution, is directly repugnant to the public right.

wealth, would be utterly impossible. But without dwelling upon the supposed inconvenience of a different rule, we think it clear upon principle, that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment, that they were, at some anterior period, laid out and established by competent authority.

NOTE.—On the many questions arising with respect to the difficult subject of Dedication, on which the authorities are numerous and conflicting, see 3 Dillon, Mun. Corp., 5th ed., c. XXIII; 2 Tiff., Real Prop., 2d ed., §§ 479-486, 533.

Mtg

915-119

Sept. 30, Mtg back

1863

1031-250

Oct. 30,

1868

1034-260

July 6,

1876

1475-73 John C

Dec. 15, '1

1885 Israel

Reg. in
Suff. #33

mechancl, foundry or manufacturing puras,
or for any oth busns or trade tht shl
be offnsv to th neighborhood for dwhees
or for th keepg of live stock

○○?

D ^ ^ 1910 ○

A Apr 3, 1910

Thos Lee N P

Mtg.
3568-209
June 30,
1915.

James Steele
to
Chas. E. Aldrich
James Stanley
Peter Paine trs
u/w John Pike
No re dower?
No seals?

2500-3-6

1 undivided half pt

Ld & bldgs (sme as
2948-18)

S & A

D. June 30, 1915

A. " " "

J S bef Thos Lee

3628-142 Ev possn Ent md May 1, 1918 by Arthur H. Hunt duly authorized atty
Aug 11, of mtgees
1918 Wits John J. Allen Abraham Vose James Murphy
D. Aug. 11, 1918

3767-165 We Chas. E. Aldrich, James Stanley & Peter Paine, trustees undr will of
John Pike, hrby const & appnt Arthur H. Hunt our true & lawful atty for
us & in our nme & std to mk th statutory entry upon certa prems sit in
Bn desc in a certn mtg gvn to us as trs as afstd by James Steele rec 3568-269
for pur of forecloeg sd mtg for breach of condth throf.
Hrby grntg full pow & auth to agn, seal, ack & deliver any and all deeds or
other insts wh he may deem necary or propr in the prems.

D. Aug. 10, 1918 ○○○

A. " 11 " C E A & J S

H. L. French

Foreclosure
Deed

3767-202
Sep. 7,
1918

Chas. E. Aldrich
James Stanley
Peter Paine trs
u/w John Pike
to
Mark A. Dean

for \$2500 pd
gr

H & A

Rec mtg & auth upon deflt to
sell at pub auc 1st pub nte
1 undivided half pt ld & bldgs
in tht pt of Bn fmly Rox
shn on pl by A. F. Noyes dt
July 1, 1887, Suffolk Dds
Pl Bk 52-375

SW on Saratoga 60
NW " Trenton 100
NE " ld n or l G. E. Alden
abt 60

SE " Mt Ida abt 100
Being &c cyd to sd trstees
by James Steele 3568-269
& is hrby cyd subj to all
valid existg liens, restns
& all unpaid taxes & assmnts
D. Sep. 7, 1918 ○○○ trustees
A. Same d. by C. E. A. bef.
John Smith J. P.

3767-205

Aff Chas. E. Aldrich, James Stanley, Peter Paine trs u/w John Pike dt June 30, 1918 deft in pymt of int. pub 3 suc wks on 16-23 & 28 Aug. 1918 in Bn Advertiser a papr pub in Bn.
Stat. 81 Ntc will be sold at pub auc on the prems in Bn on Tues Aug. 31, 1918 at 3 o'clock P.M. all & sing th prems cyd by sd mtg & deeo
days? in ad mtg as folls

(Sm Descriptn)

Sd prems will be cyd subj to all unpaid taxes, liens, restns & asmnts

C E A, J S, P P trs & Mtgees

Present holders of Said Mortgage

Purs to sd ntc & at tm & plc thrin appntd on th prems sold th prems at Pub Auc by Geo N. Goodrich, duly lic auctnr, to Mark A. Dean for 2500 highest bid

D. Aug. 11, 1918 C E A, J S, P P trs as afsd

○○○

Sworn to Aug. 11, 1918

James Wheeler N P

3809-100

Dec. 23,
1918

John Munroe

to

Mark A. Dean

1 &c

H & A

WD

D & H

ux Ann C.

One undivided half part of ld & bldgs
 in tht pt of Bn fmly Rox

(Sme descriptn as 2948-18)

Being prems cyd by my dd to James Steele & myself rec 2948-18 & they are now cyd wth benf of & subj to th restns thrin set forth.

D. Dec. 22, 1918

○

A. Dec. 22, 1918

Thos. Lee

N P

Suff. #190603

Mark A. Dean Bn d June 28, 1920

Elizabeth T. Dean widow

Mary E. Cutter ux G. R. dau Fitchburg

John E. Dean son Springfield

Will

1. Pymt of debts & c
2. Wf Elizabeth T. Dean (pers)
3. To Dean Academy of Burlington, Vt. 50000 wth int at 6% fr dy of my dec to be added to th permanent fund & incm used for cur expenses.
4. To Mary J. Field ux David M. 5000 & pers
5. To John Harding 3000
6. To Mrs. Hannah Flint dau sd John 4000. In case of her dec to her childn
7. To James Adams 5000
8. Residue in trust for ux for life, remainder to various institutions.
9. Full pow of sale to exors & trustees

July 10, 1920 Petn Jos. H. Cotton, Timothy H. Sawyer & Chas E. Hill
tht w be alld & lettrs test issued to them without sur

Cit Bn Evng Trans

Ret Aug 1, 1920

Aug 1, 1920 Granted Bn Evng Trans

Aug 3, 3 bonds 1000000 ea no sur

Aff ntc of appointmt (none)

Oct 13, 1920 Inv. R. 454000 P 25000

Acct.

Showing all legacies pd (not allowed)

Trust.

Aftr pymt of all debts and expenses and legacies herinbef ment, I g, d and
b th remdr of my est, re, per & mixed of whatever nme and nature and
whrsoevr sit unto ad trs, to pay 1/2 th net inc to my wf, Elizabeth T. Dean,
durng her nat life and on her dth th ad 1/2 to become pt of residue.

The othr 1/2 of ad net incm I g, d and b to the follg insts in equal shrs,
Natural History Society, Winchester College, Boston School of Fine Arts.
Boston Mechanical School and Hospital for Women & Children. Upon
the death of my ad wife the whole of said tr propty shl be pd over to the abv
amd instutns in equal amts.

Testy clause O. K. 3 wita.

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